



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

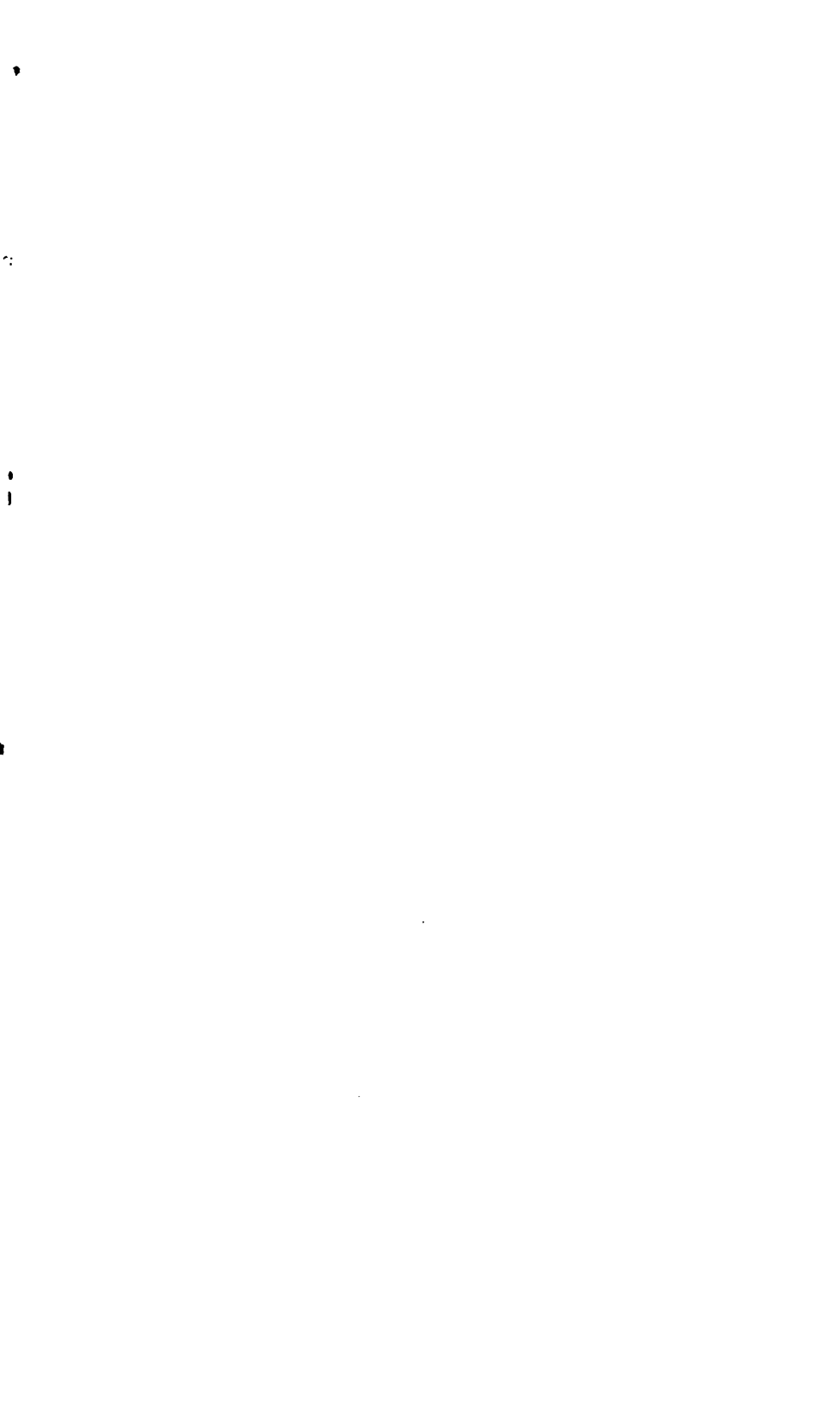
- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

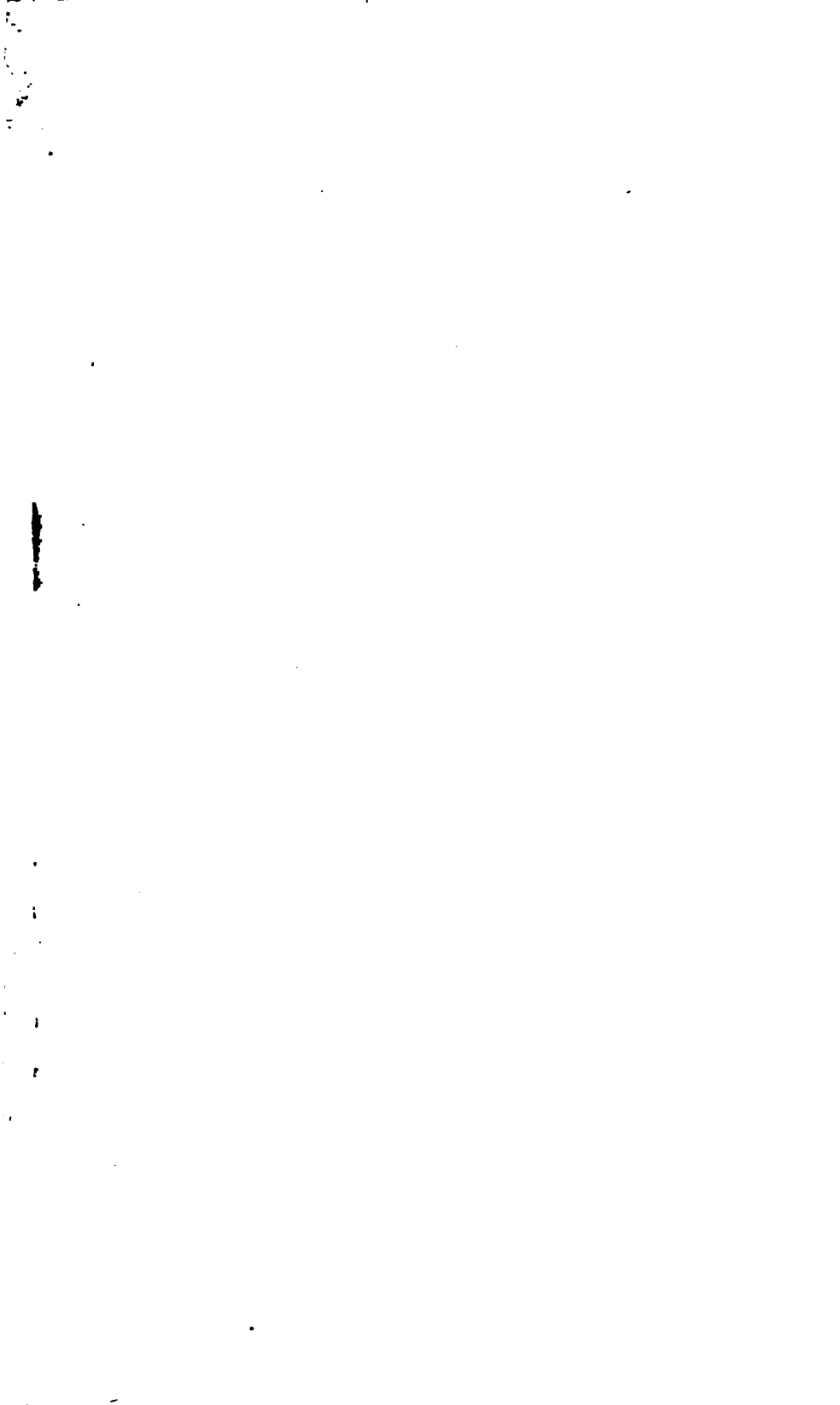
About Google Book Search

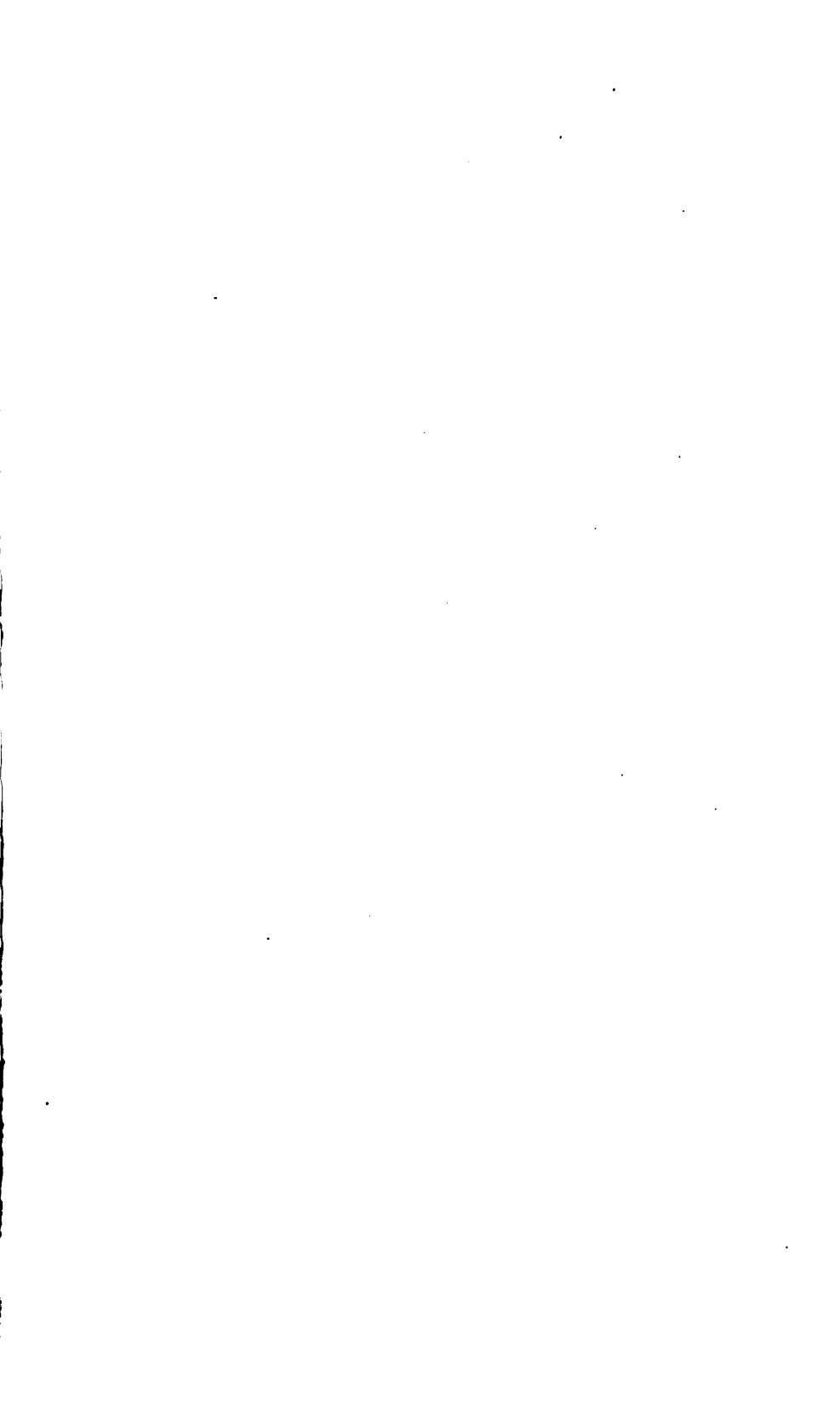
Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



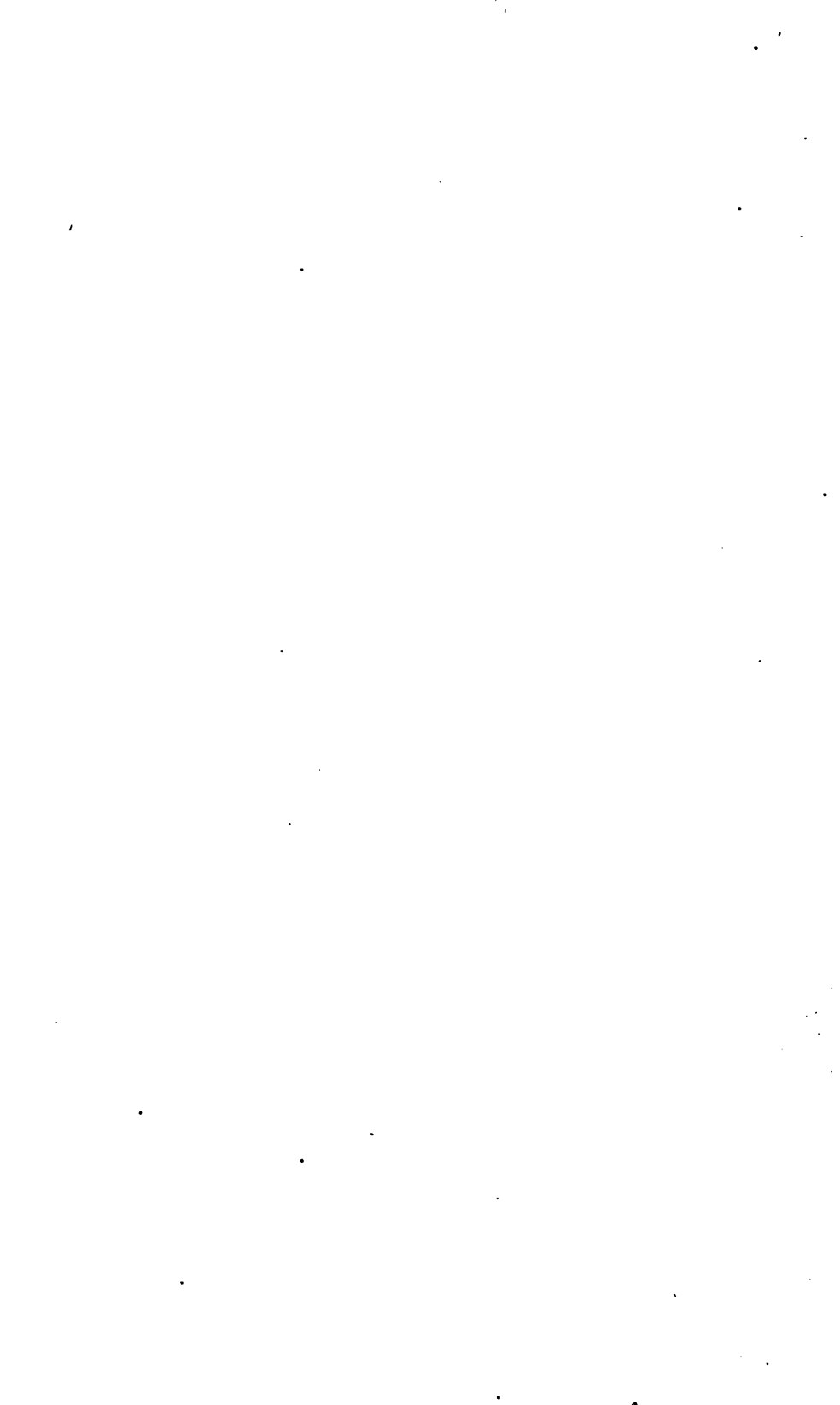
**HARVARD LAW SCHOOL
LIBRARY**











2.13.16

81

June 14

REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF MONTANA,

FROM JUNE 5, 1899, TO FEBRUARY 9, 1900.

OFFICIAL REPORT.

VOLUME XXIII.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1900.

Entered according to Act of Congress in the year 1899,
By BANCROFT-WHITNEY COMPANY,
In the Office of the Librarian of Congress, at Washington.

Rec. Aug. 16, 1900.



ANACONDA, MONT:
STANDARD PUBLISHING COMPANY,
PRINTERS AND BINDERS.

JUSTICES

OF

The Supreme Court of the State of Montana,

DURING THE TIME OF THESE REPORTS.

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. WILLIAM H. HUNT,
THE HON. WILLIAM T. PIGOTT, } Associate Justices.

OFFICERS OF THE COURT.

C. B. NOLAN, Attorney General.

HENRY G. RICKERTS, Clerk.

OLIVER T. CRANE, Marshal.

ATTORNEYS AND COUNSELORS AT LAW

ADMITTED FROM DECEMBER 20, 1899, TO MAY 11, 1900.

DENNY, JAMES M.

ENGLISH, M. J.

LARMOUR, WM. J.

LIKENS, W. W.

MACKEL, ALEXANDER

TOWNER, W. S.

JUDGES AND JUDICIAL DISTRICTS.

The First Judicial District embraces the County of Lewis and Clarke; HENRY C. SMITH and S. H. McINTIRE, Judges; residing at Helena.

The Second Judicial District embraces the County of Silver Bow; WILLIAM CLANCY and JOHN LINDSAY, JUDGES; residing at Butte.

The Third Judicial District embraces the Counties of Deer Lodge and Granite; WELLING NAPTON, Judge; residing at Deer Lodge.

The Fourth Judicial District embraces the Counties of Missoula and Ravalli; FRANK H. WOODY, Judge; residing at Missoula.

The Fifth Judicial District embraces the Counties of Beaverhead, Jefferson and Madison; H. M. PARKER, Judge; residing at Boulder.

The Sixth Judicial District embraces the Counties of Park, Carbon and Sweet Grass; FRANK HENRY, Judge; residing at Livingston.

The Seventh Judicial District embraces the Counties of Yellowstone, Custer and Dawson; CHARLES H. LOUD, Judge; residing at Miles City.

The Eighth Judicial District embraces the County of Cascade; J. B. LESLIE, Judge; residing at Great Falls.

The Ninth Judicial District embraces the Counties of Gallatin, Broadwater and Meagher; FRANK K. ARMSTRONG, Judge; residing at Bozeman.

The Tenth Judicial District embraces the Counties of Chouteau, Valley and Fergus; DUDLEY DU BOSE, Judge; residing at Fort Benton.

The Eleventh Judicial District embraces the Counties of Flathead and Teton; D. F. SMITH, Judge; residing at Kalispell.

ERRATA.

Page 69, line 13, read "separate" instead of "seperate."

Page 79, paragraph 1 of the syllabus, line 1, after the word "guilty" insert the word "beyond."

Page 115, line 8, read "4753" instead of "4723."

Page 117, line 15, read "nature" instead of "nautre."

Page 199, line 7, read "complementary" instead of "complimentary."

Page 284, at bottom of page, insert "Mr. Justice Pigott, having been of counsel, took no part in this decision."

An Amendment of the Rules of the Supreme Court.

The Court now here orders that Subdivision 3 of Rule XII of the Rules of the Court be and is amended so as to read as follows:

“3. ADVANCEMENT OF CASES.—Appeals in criminal cases; appeals from orders dissolving, or refusing to dissolve, granting, or refusing to grant, writs of injunction; appeals from orders dissolving, or refusing to dissolve, attachments; appeals from orders appointing, or refusing to appoint, receivers, and from orders refusing to vacate orders appointing receivers; appeals from orders or judgments holding appellant in custody; and all original proceedings are entitled to precedence, and will, upon motion of either party, be advanced on the calendar.”

It is further ordered that said section as so amended shall take effect and be in force on and after the 1st day of July, 1900.

Promulgated May 10, 1900.



TABLE OF CASES REPORTED.

Allen, State v.....	118
American Hand-Sewed Shoe Co. v. O'Rourke et al....	530
Anaconda Copper Mining Co., State v.....	498
Anderson v. Carlson.....	43
Atkinson v. Webster et al.....	1
Atkinson v. Webster et al.....	33
Bandman v. Davis.....	382
Board of Commissioners of Granite County, State ex rel. Donyes v.....	220
Board of Commissioners of Lewis and Clarke County, Penwell v.....	351
Bordeaux, Yank v.....	205
Boston & Montana Consol. C. & S. Mining Co. et al., Forrester & MacGinniss v.....	122
Boston & Montana Consol. C. & S. Mining Co. v. Mont- ana Ore Purchasing Co. et al.....	557
Bramlett et al. v. Flick et al.....	95
Brooks, State v.....	146
Butte & Boston Mining Co. v. Societe Anonyme des Mines de Lexington.....	177
Calder, State v.....	504
Call, City of Butte v.....	94
Cameron v. Wentworth et. al.....	70
Carlson, Anderson v.....	43
City of Butte v. Call.....	94
City of Philipsburg et al., State ex rel. Kaiser Water Co. v.....	16
Coad, State ex rel. Lambert v.....	131
Cobban v. Hinds et al.....	338
Cornelius et al., Gallagher et al. v.....	27
Cotter v. Grand Lodge, A. O. U. W.....	82

Danforth v. Livingston	558
Davis, Bandman v.	382
Davis et al., Manhattan Trust Co. v.	273
Deloughrey v. Hinds et al.	260
Denniff, Smith v.	65
Dowty v. Pittwood.	113
Estate of Tuohy.	305
Fisher, State v.	540
Fitzpatrick et al., Reynolds v.	52
Flick et al., Bramlett et al. v.	95
Forrester & MacGinnis v. Boston & Montana Consol C. & S. Mining Co. et al.	122
Franklin v. Schultz et al.	165
Gallagher et al. v. Cornelius et al.	27
Grage v. Paulson.	337
Grand Lodge, A. O. U. W., Cotter v.	82
Great Falls Opera House Co. et al., Merchants' Nat'l Bank v.	33
Great Falls Opera House Co. et al., Northwestern Nat'l Bank v.	1
Haggin v. Saile et al.	375
Harding v. McLaughlin et al.	334
Harrison, State v.	79
Hickey et al., Washoe Copper Co. v.	319
Hilburn v. St. Paul, M. & M. Ry. Co. et al.	229
Hinds et al., Cobban v.	338
Hinds et al., Deloughrey v.	260
Horst v. Shea et al.	390
Hurst, State v.	484
Hyde, Patten v.	23
In re Application of Plume.	41
In re Wellcome.	140
In re Wellcome.	213

TABLE OF CASES REPORTED.

xi

In re Wellcome.....	259
In re Wellcome.....	450
Judge of the Ninth Judicial District Court, State ex rel. Coad v.....	171
Laddin et al., Purdum v.....	387
Livingston, Danforth v.....	558
Manhattan Trust Co. v. Davis et al.....	273
McClellan et al., State v.....	532
McLaughlin, Harding v.....	334
Merchants' Nat'l Bank v. Great Falls Opera House Co. et al.....	33
Montana Mining Co. (Limited) et al. v. St. Louis Min- ing & Milling Co. et al.....	311
Montana Ore Purchasing Co. et al., Boston & Montana Consol. C. & S. Mining Co. v.....	557
Murray et al. v. Polglase et al.....	401
Northwestern Nat'l Bank v. Great Falls Opera House Co. et al.....	1
Noyes et al. v. Ross et al.....	425
O'Rourke et al. v. American Hand-Sewed Shoe Co....	530
O'Rourke et al. v. Sherman.....	310
O'Rourke v. Schultz.....	285
Patten v. Hyde.....	23
Paulson, Grage v.....	337
Peel, State v.....	358
Penwell v. Board of County Commissioners.....	351
Pepo, State v.....	473
Pittwood, Dowty v.....	113
Plume, In re Application of.....	41
Polglase et al., Murray et al. v.....	401
Purdum v. Laddin et al.....	387

Reynolds v. Fitzpatrick et al.....	52
Ross et al., Noyes et al. v.....	425
Saile et al., Haggin v.....	375
Schnepel, State v.....	523
Schultz, Franklin v.....	165
Schultz, O'Rourke v.....	285
Second Jud. Dist. Court et al., State ex rel. Hickey v.....	564
Shea et al., Horst v.....	390
Shepphard, State v.....	323
Sherman, O'Rourke et al. v.....	310
Smith v. Denniff.....	65
Smith, Governor, State ex rel. State Publishing Co. v.....	44
Smith, Judge, State ex rel. Independent Pub. Co. et al. v.....	329
Societe Anonyme des Mines de Lexington, Butte & Boston Mining Co. v.....	177
State v. Allen.....	118
State v. Anaconda Copper Mining Co.....	498
State v. Brooks.....	146
State v. Calder.....	504
State v. Fisher.....	540
State v. Harrison.....	79
State v. Hurst.....	484
State v. McClellan et al.....	532
State v. Peel.....	358
State v. Pepo.....	473
State v. Schnepel.....	523
State v. Shepphard.....	323
State ex rel. Coad v. Judge of the Ninth Judicial Dis- trict Court.....	171
State ex rel. Donyes v. Board of Commissioners of Granite County.....	250
State ex rel. Hickey v. Second Judicial District Court.....	564
State ex rel. Independent Publishing Co. et al. v. Smith, Judge.....	329
State ex rel. Kaiser Water Co. v. City of Philipsburg.....	16
State ex rel. Lambert v. Coad.....	131

TABLE OF CASES REPORTED.

xiii

State ex rel. State Publishing Co. v. Smith, Governor.	44
St. Louis Mining & Milling Co. et al., Montana Mining Co. v.....	311
St. Paul, M. & M. Ry. Co. et al., Hilburn, County Treasurer, v.....	229
Tuohy's Estate.....	305
United Smelting & Refining Co. (Paulson), Grage v...	337
Washoe Copper Co. v. Hickey, et al.....	319
Webster et al., Atkinson v.....	1
Webster et al., Atkinson v.....	33
Wellcome, In re.....	140
Wellcome, In re.....	213
Wellcome, In re.....	259
Wellcome, In re.....	450
Wentworth et al., Cameron v.....	70
Yank v. Bordeaux.....	205

TABLE OF CASES CITED.

(For cases cited from the Montana Reports, see table at the end of this volume.)

Abendroth v. Town of Greenwich, 29 Conn. 356.....	309
Adler & Bros. v. Claffin, Mellin & Co., 17 Iowa, 89.....	448
Alford v. McCormac, 90 N. C. 151.....	60
Alleghany Co., Home's Appeal, 77 Pa. St. 77.....	503
Allen v. Goodnow, 71 Me. 420.....	447
Allen v. State, 111 Ala. 80.....	527
Altoona Quicksilver Min. Co. v. Integral Q. Min. Co., 114 Cal. 100...	417
Anderson v. State, 43 Conn. 514.....	371
Anderson v. Todd, (N. D.) 77 N. W. 599.....	170
Ankeny v. Moffett, 37 Minn. 109.....	9
Armstrong v. American Ex. Nat'l Bank, 133 U. S. 433.....	31
Armstrong v. Toler, 11 Wheat. 258.....	31
Arnold v. Skaggs, 35 Cal. 684.....	161
Arp v. State, 97 Ala. 5.....	557
Atlee v. Fink, 75 Mo. 100.....	11
Attorney General v. Supervisors, 42 Mich. 72.....	563
Aurora Hill Consol. Min. Co. v. 85 Min. Co., 34 Fed. 515.....	421
Babcock v. Goodrich, 47 Cal. 488.....	246
Baker v. Com., 10 Bush. 592.....	226
Baltimore & O. R. R. Co. v. O'Donnell, 49 Ohio St. 489.....	64
Bath v. Valdez, 70 Cal. 350.....	105
Bein v. Heath, 12 How. (U. S.) 168.....	317
Belk v. Meagher, 104 U. S. 284.....	389, 397
Bell v. McConnell, 37 Ohio St. 396.....	11
Benson M. & S. Co. v. Alta M. & S. Co., 145 U. S. 428.....	421
Black v. Caldwell, 83 Fed. 883.....	284
Blackburn v. State, 23 Ohio St. 146.....	370
Blake v. Rourke, 74 Iowa, 519.....	365
Board of Commissioners v. Gillies, 138 Ind. 667.....	138
Bonds v. Hickman, 29 Cal. 461.....	322
Book v. Justice Mining Co., 58 Fed. 106.....	102, 103
Booth v. F. & N. Nat'l Bank, 74 N. Y. 228.....	37
Boston & M. Consol. C. & S. Min. Co. v. Mont Ore P. Co., 89 Fed. 529.....	203
Brackett v. Harvey, 91 N. Y. 214.....	445
Bradley v. Bouchard, 85 Mich. 18.....	349
Brady v. Husby, 21 Nev. 453.....	102
Brady v. Mayor, etc., 20 N. Y. 312.....	137
Bright v. Stone, (Ky.) 43 S. W. 207.....	258
Brock v. State, 85 Ind. 397.....	325
Brown v. Galena M. & S. Co., 32 Kan. 528.....	317
Brown v. Graham, 24 Ill. 628.....	210

Brown v. O'Neal, 95 Cal. 262.....	210
Brown v. Prewett, 94 Cal. 502.....	42
Brown v. White, 29 N. J. Law, 514.....	38
Bunker v. Miles, 30 Me. 431.....	11
Buntain v. State, 15 Tex. Ct. App. 515.....	522
Burch v. Newbury, 10 N. Y. 374.....	246
Burg v. Chicago, etc., Ry. Co., 90 Iowa, 106.....	493
Byers v. R. R., 94 Tenn. 345.....	493
Byrd v. Hughes, 84 Ill. 174.....	11
Campbell v. Pope, 96 Mo. 468.....	38
Canfield v. Great Camp, etc., 87 Mich. 826.....	90, 92
Careaga v. Fernald, 66 Cal. 351.....	42
Carroll v. Safford, 3 How. 441.....	418, 419
Carter v. Kalloch, 56 Cal. 335.....	137
Case v. Beauregard, 99 U. S. 119.....	437
Case of Austin, 5 Rawle, 191.....	227
Chaffee's Appeal, 56 Mich. 244.....	241
Chase v. Curtis, 113 U. S. 452.....	280
Cheesman v. Shreeve, 40 Fed. 787.....	198
Chicago & A. R. R. Co. v. Legg, 32 Ill. App. 218.....	493
Chipman v. Morrill, 20 Cal. 131.....	7
City & County of San Francisco v. Staude, 92 Cal. 560.....	318
Clark v. Clayton, 61 Cal. 634.....	317
Clarke v. Austin, 96 Cal. 283.....	9
Coffee v. Tevis, 17 Cal. 239.....	38, 39
Coffin v. U. S., 156 U. S. 432.....	80
Com. v. Brown, (Va.) 28 L. R. A. 110.....	501
Com. v. Choate, 106 Mass. 451.....	536
Com. v. Mosler, 4 Pa. St. 264.....	370
Com. v. Rogers, 7 Metc. 500.....	370
Conklin v. Shelley, 28 N. Y. 360.....	446
Continental Trust Co. v. Toledo, etc., R. Co., 86 Fed. 929.....	11
Conway v. State, 118 Ind. 482.....	370
Cornell v. State, (Wis.) 80 N. W. 745.....	522
Crooker v. Benton, 93 Cal. 365.....	68
Crow v. Red River Co. Bank, 52 Tex. 362.....	448
Curtis v. Sutter, 15 Cal. 260.....	566
Dacey v. People, 116 Ill. 555.....	371
Danlher v. Grand Lodge, 10 Utah, 110.....	91
Davis v. Heimbach, 75 Cal. 261.....	9
Davis v. U. S., 160 U. S. 469.....	163, 374
Dejarnette v. Com., 75 Va. 867.....	371
Dement v. Rokker, 126 Ill. 174.....	138
Denning v. Butcher, 91 Iowa, 425.....	365
Deno v. Griffin, 20 Nev. 249.....	421
Des M. Co. Agr. Society v. Tubbessing, 87 Iowa, 138.....	309
Dickinson v. City of Poughkeepsie, 75 N. Y. 65.....	138
Dr. Jack v. Territory, 2 Wash. Ter. 101.....	121
Doe v. Waterloo Mining Co., 70 Fed. 455.....	110
Doles v. State, 97 Ind. 555.....	480

TABLE OF CASES CITED.

xvii

Dougherty v. Dore, 63 Cal. 170.....	317
Drake v. Drake, 15 N. C. 110.....	241
Drew v. State, 124 Ind. 9.....	526
Eastern B. & L. Ass'n v. Bedford, 88 Fed. 7.....	281
Eddy v. Traver, 6 Paige, 521.....	37
Elgin I. & E. Ry. Co. v. Reese, 70 Ill. App. 463.....	493
Enterprise Min. Co. v. Rico-Aspen C. Min. Co., 167 U. S. 108.....	417
Erhardt v. Boaro, 113 U. S. 527.....	111, 112
Estate of Calahan, 60 Cal. 232.....	306
Etheridge v. Sperry, 139 U. S. 266.....	440, 441, 442
Eureka Consol. Min. Co. v. Richmond Min. Co., 4 Sawyer, 302.....	196
Ewing v. Burnet, 11 Pet. 52.....	105
Ex parte Chambers, 10 Mo. App. 240.....	332
Ex parte Rowland, 104 U. S. 604.....	174
Farmers' Bank v. Hale, 59 N. Y. 53.....	241
Farrar v. Fessenden, 39 N. H. 268.....	247
Faurot v. Gates, 86 Wis. 569.....	40
Felner v. Wilson, 55 Ark. 77.....	448
Fertig v. State, 100 Wis. 301.....	521
Fillmore v. Great Camp, etc., 103 Mich. 437.....	90
Fillmore v. Great Camp, etc., 109 Mich. 13.....	90
Fink v. Ehrman Bros., 44 Ark. 310.....	448
Fitzgerald v. Goff, 99 Ind. 28.....	480
Flagg v. Puterbaugh, 98 Cal. 134.....	42
Flemming v. Beaver, 2 Rawle, 128.....	37
Forehand v. State, 51 Ark. 553.....	121
Fort v. State, 52 Ark. 180.....	520
Fountain v. West, 23 Iowa, 9.....	363
420 Mining Co. v. Bullion Min. Co., 9 Nev. 240.....	413
France v. France, 8 N. J. Eq. 619.....	566
Frankhouser v. Ellett, 22 Kan. 127.....	443, 446, 447
Fredericks v. Tracy, 98 Cal. 658.....	78
Gage v. Evans, 90 Ill. 570.....	563
Gay v. Bidwell, 7 Mich. 519.....	443
German-American Bank v. Fritz, 68 Wis. 390.....	36, 37
Gleason v. Martin White Min. Co., 13 Nev. 442.....	111
Gleason v. Wilson, 48 Kan. 500.....	447
Goodwin v. State, 96 Ind. 550.....	527
Goodyear v. Watson, 14 Barb. 486.....	37
Gottlieb v. Hartman, 3 Colo. 53.....	77
Graham v. Com., 16 B. Mon. 587.....	370
Graham Paper Co. v. Pembroke, (Cal.) 56 Pac. 627.....	211
Grant v. Langstaff, 52 Ill. App. 128.....	91
Grimm v. U. S., 156 U. S. 604.....	472
Grisell v. Noel Bros.' Flour-Feed Co., 9 Ind. App. 251.....	325
Guiteau's Case, 10 Fed. 161.....	164
Haight v. Mayor, etc., 99 N. Y. 280.....	349
Hamilton v. Rosenblatt, 8 Mo. App. 237.....	563
Hammat v. Wyman, 9 Mass. 138.....	37

Hammer v. Garfield M. & M. Co., 130 U. S. 291.....	102
Hamper's Appeal, 51 Mich. 71.....	353
Haney v. State, 34 Ark. 263.....	245
Hansing v. Territory, 4 Okl. 443.....	121
Harbeck v. Vanderbilt, 20 N. Y. 395.....	37
Harnett v. Cent. Pac. R. R. Co., 78 Cal. 31.....	26
Harrington v. Work. Ben. Ass'n 70 Ga. 340.....	91
Hastings & Dakota R. R. Co. v. Whitney, 132 U. S. 357.....	419, 420
Herbert v. Beathard, 26 Kan. 746.....	333
Hibbard v. Kirby, 38 Ark. 102.....	326
Hicks v. Masten, 101 Cal. 651.....	42
Hill v. Gilman, 39 N. H. 88.....	60
Hill v. Graham, 72 Mich. 659.....	319
Hinkle v. R. R. Co., 55 Cal. 627.....	529
Hobler v. Cole, 49 Cal. 250.....	161
Hovey v. State, 127 Ind. 588.....	49
Hughe's Case, 1 Bland (Md.) 46.....	241
Huntington v. Atrill, 146 U. S. 657.....	279
In re Bauquier's Estate, 88 Cal. 302.....	307
In re Blake, 3 El. & El. 33.....	226
In re Carriger's Estate, 104 Cal. 81.....	26
In re Cooper, 22 N. Y. 67.....	260
In re Dean's Estate, 62 Cal. 613.....	307
In re Estate of Edwards et al., 122 Mo. 426.....	438
In re Harrison, 2 Land Dec. Dep. Int. 767.....	421
In re Hendricks, (Kan. Sup.) 57 Pac. 965.....	241
In re Hill, L. R. 3 Q. B. 543.....	225
In re Lutz's Estate, 67 Cal. 457.....	307
In re Manhattan R. Co., 102 N. Y. 301.....	138
In re Mills, 1 Mich. 394.....	225
In re Moore's Estate, 86 Cal. 58.....	307
In re O—, 73 Wis. 602.....	226
In re Randel, 158 N. Y. 216.....	468
In re Smith's Estate, 98 Cal. 636.....	307
In re Walkerly's Estate, 94 Cal. 352.....	307
In re Wiard's Estate, 83 Cal. 619.....	307
International, etc. R. R. Co. v. Smith, 54 Tex. 1.....	563
In the Matter of the 15th Ave. Ex., 54 Cal. 179.....	322
In the Matter of the Petition of Mayer, 50 N. Y. 504.....	503
Iron Silver Mining Co. v. Cheesman, 116 U. S. 529.....	192-200
Iron Silver Mining Co. v. Elgin M. & S. Co., 118 U. S. 203.....	193
Ironwood Store Co. v. Harrison, 75 Mich. 197.....	327
Jackson v. State, 21 Tex. 668.....	227
Jeane v. Grand Lodge, 86 Me. 434.....	91
Johnson v. State, 21 Tex. App. 368.....	536
Jones v. Layman, 123 Ind. 569.....	325
Jones v. Ross, 48 Kan. 474.....	317
Jones v. Sanders, 103 Cal. 678.....	26
Jones v. State, 52 Ark. 345.....	521
Jones v. Thorne, 80 N. C. 72.....	566

TABLE OF CASES CITED.

xix

Kansas Pac. Ry. Co. v. Dunmeyer, 113 U. S. 629.....	419-420
Kaye v. Kean, 18 B. Mon. 839.....	176
Kennedy v. Dale, 4 Watts & S, 176.....	363
Kinney v. Watts, 14 Wend. 38.....	309
Klippel v. Shields, 90 Ind. 81.....	38
Koepke v. Dyer, 80 Mich. 311.....	174
Krumdick v. Crump, Judge, 98 Cal. 117.....	333
Lake Erie & W. R. R. Co. v. Mugg, 132 Ind. 168.....	493
Lancaster Co. v. Frey, 128 Pa. St. 593.....	246
Landregan v. Peppin, 86 Cal. 122.....	349
Lane v. Starr, 1 S. Dak. 107.....	447
Leeper v. State, 29 Tex. Ct. App. 154.....	522
Levy v. Order of Iron Hall, 67 N. H. 593.....	91
Lidderdale's Ex'rs v. Robinson's Ex'r, 12 Wheat. 595.....	38
Lindsley v. Williams, 20 N. J. Eq. 93.....	246
Lum v. McEwen, 56 Minn. 278.....	11
Luther v. Saylor, 8 Mo. App. 424.....	503
Mappa v. City Council, 61 Cal. 309.....	137
Marbury v. Madison, 1 Cranch, 137.....	48
Marshall v. Harney Peak Tin M. Co., 1 S. D. 350.....	111
Matthews v. Com., 13 Grat. (Va.) 989.....	246
Maxwell v. Board of Supervisors, 53 Cal. 389.....	137
Mayor, etc. v. Mabie, 13 N. Y. 151.....	309
McAles v. Supreme Sitting Order, (Pa.) 13 Atl. 755.....	91
McDaniel v. Lee, 37 Mo. 206.....	36
McDonald v. Mayor, etc., 68 N. Y. 23.....	137
Merrick v. Hutt, 15 Ark. 331.....	349
Miller v. Davidson, 3 Gilman, 518.....	11
Miller v. Pancoast, 29 N. J. Law, 250.....	446
Mining Co. v. Taylor, 100 U. S. 37.....	397
Mississippi v. Johnson, 4 Wall. 475.....	48
Mitchell v. State, 44 Ala. 68.....	526
Model Mill Co. v. McEver, 95 Ga. 701.....	527
Montclair v. Ramsdell, 107 U. S. 155.....	501
Moody v. Stephenson, 1 Minn. 401.....	246
Moser v. White, 29 Mich. 59.....	247
Mt. Blanc Con. G. Min. Co. v. Debour, 61 Cal. 364.....	417
Murray v. Com. (Ky.) 28 S. W. 480.....	520
Natoma Co. v. Clarkin, 14 Cal. 543.....	566
Natoma Co. v. Parker, 16 Cal. 85.....	566
Neuendorff v. Duryea, 69 N. Y. 557.....	503
Nicolson Pavement Co. v. Painter, 35 Cal. 699.....	137
Noel v. Drake, 28 Kan. 265.....	11
N. P. R. R. Co. v. DeLacey, 174 U. S. 622.....	419
N. P. R. R. Co. v. Sanders, 166 U. S. 620.....	419
Oliver v. Eaton, 7 Mich. 107.....	443
Oliver v. Hopkins, 144 Mass. 175.....	91
Olson v. Thompson, 6 Okla. 74.....	78
Omar v. Sopar, 11 Colo. 380.....	111
Ortwein v. Com., 76 Pa. St. 414.....	370

Palmer v. Foley, 71 N. Y. 106.....	317
Palms v. Shawano Co., 61 Wis. 211.....	246
Parsons v. State, 81 Ala. 577.....	370
Peabody v. Landon, 61 Vt. 318.....	440
People v. Ah You, 47 Cal. 121.....	363
People v. Armstrong, 44 Cal. 326.....	327
People v. Beck, 58 Cal. 212.....	526
People v. Betts, (Colo.) 58 Pac. 1091.....	471
People v. Bitancourt, 74 Cal. 188.....	42
People v. Bonds, 1 Nev. 33.....	552
People v. Bristol, 35 Mich. 29.....	447
People v. Carrier, 46 Mich. 442.....	363
People v. Chares, 26 Cal. 78.....	552
People v. Chavez, 103 Cal. 407.....	522
People v. Christian, 78 Hun. 28.....	520
People v. Clerk of Court, 22 Colo. 280.....	332
People v. Cox, 70 Mich. 247.....	81
People v. Demasters, 109 Cal. 607.....	161
People v. Dole, 122 Cal. 486.....	496
People v. Durrant, 116 Cal. 179.....	78
People v. Elliott, 106 N. Y. 288.....	520
People v. Evans, 40 N. Y. 1.....	513
People v. Finley, 38 Mich. 482.....	81
People (ex rel.) v. Gleason, 121 N. Y. 631.....	138
People v. Grundell, 75 Cal. 301.....	520
People v. Hawes, 98 Cal. 648.....	527
People v. Henchler, 137 Ill. 580.....	325
People v. Hersey, 53 Cal. 574.....	552
People v. Hicks, 53 Cal. 354.....	78
People (ex rel.) v. Hoffman, 97 Ill. 234.....	246, 249
People v. Hooghkerk, 96 N. Y. 149.....	520
People v. Hubbard, 22 Cal. 35.....	332
People v. Judge of 12th Dist., 17 Cal. 548.....	332
People v. Kearney, 43 Cal. 384.....	552
People v. Kindleberger, 100 Cal. 363.....	556
People v. Lee, 14 Cal. 510.....	42
People v. Leong Sing, 77 Cal. 117.....	324
People v. Mahoney, 77 Cal. 529.....	122
People v. McRoberts, 100 Ill. 458.....	332
People v. Montgomery, 53 Cal. 576.....	363
People (ex rel.) v. Morton, 156 N. Y. 136.....	49
People v. Noelke, 94 N. Y. 137.....	472
People v. O'Neal, 67 Cal. 378.....	160
People v. Page, 1 Idaho, 106.....	121
People v. Palmer, 109 N. Y. 110.....	481, 514
People v. Prospero, 44 Cal. 186.....	552
People v. Repke, 103 Mich. 459.....	557
People v. Righetti, 66 Cal. 184.....	78
People v. Roberts, 122 Cal. 377.....	536
People v. Sexton, 24 Cal. 78.....	332
People v. Soto, 59 Cal. 367.....	78
People v. Sprague, 53 Cal. 491.....	78
People v. Stubenvoll, 62 Mich. 329.....	81

TABLE OF CASES CITED.

xxi

People v. Williams, 45 Cal. 25.....	324
People v. Woods, 43 Cal. 176.....	327
People's Savings Bank v. Bates, 120 U. S. 556.....	442
People's Savings Bank v. Jones, 114 Cal. 422.....	78
Perkins v. Morse, 78 Me. 17.....	309
Peters v. McWilliams, 36 Ohio St. 155.....	9, 36
Peyton v. State, 54 Neb. 188.....	536
Pillow v. Gaines, 3 Lea, 466.....	241
President, etc. D. & H. C. Co. v. Penn. C. Co., 50 N. Y. 258.....	90
Preslar v. Stallworth, 37 Ala. 402.....	38
Porter v. Gile, 44 Vt. 520.....	37
Porter v. R. R. Co., 76 Ill. 561.....	563
Poultney v. Bachman, 31 Hun. 49.....	91
Powell v. State, 61 Miss. 319.....	121
Powell v. Supervisors of B. County, 88 Va. 707.....	501
Purnell v. Mann, (Ky.) 48 S. W. 407.....	257
Purple v. Farrington, 119 Ind. 164.....	438
Rater v. State, 49 Ind. 507.....	472
Redfield v. Parks, 132 U. S. 239.....	397
Regina v. Tyler, 8 Carr. & Payne, 923.....	557
Republic Ins. Co. v. Pollok, 75 Ill. 294.....	562
Reynolds v. Johnson, 54 Ark. 449.....	437
Rice v. Wood, 113 Mass. 133.....	10
Richardson v. City of Eureka, 110 Cal. 441.....	382
Richmond Min. Co. v. Eureka Min. Co., 103 U. S. 839.....	203
Richter v. Henningsan, 110 Cal. 530.....	7
Robinson v. Elliott, 22 Wall. 512.....	442
Robinson v. Irish-American Ben. Soc., 67 Cal. 135.....	91
Robinson v. Templar Lodge, 117 Cal. 370.....	90, 91
Rogers v. Goodwin, 2 Mass. 477.....	249
San Jose Gas Co. v. January, 57 Cal. 616.....	563
San Luis Obispo Co. v. Felts, 104 Cal. 60.....	254
Sawyer v. Long, 86 Me. 541.....	447
Scanlan v. Childs, 33 Wis. 663.....	249
Schrodt v. Deputy, 88 Ind. 90.....	349
Schultz v. Territory, (Arizona) 52 Pac. 352.....	535
Scott v. People, 141 Ill. 195.....	527
Scribner v. Hickock, 4 Johns. Ch. 530.....	37, 38
Sherwood v. Collier, 14 N. C. 380.....	37, 38
Shiffert v. Montgomery Co., 12 Montg. Co. Law Rep'r, 100.....	254
Smith v. Brady, 17 N. Y. 137.....	169
Smith v. Logan, 18 Nev. 149.....	69
Smith v. Ocean Castle, 59 N. J. Law, 198.....	91
Smith v. Smith, 87 Iowa, 93.....	438
Smith v. State, 9 Tenn. 228.....	226
Smith v. U. S. 1 Wash. Ter. 262.....	521
South End Min. Co. v. Tinney, 22 Nev. 67.....	396
Southern Pac. R. R. Co. v. Brown, 21 C. C. A. 236.....	419
Sperry v. Etheridge, 63 Iowa, 543.....	443
Spinks v. Davis, 32 Miss. 152.....	11
Stafford v. Whitcomb, 8 Allen, 518.....	63

State v. Acuff, 6 Mo. 55.....	246
State v. Beasley, 5 Mo. 91.....	246
State v. Becker, 3 So. Dak. 29.....	503
State v. Bokien, 14 Wash. 411.....	508
State v. Broderick, 61 Vt. 421.....	526
State v. Carson, 6 Wash. 250.....	254
State v. Clarke, 46 Iowa, 155.....	260
State v. Clayton, 34 Mo. App. 569.....	332
State v. Cook, 30 Kan. 82.....	508
State (ex rel.) v. Cornell, 52 Neb. 25.....	138
State v. Cotton, 33 Neb. 561.....	332
State v. Day, 100 Mo. 242.....	526
State v. Elkinton, 30 N. J. Law, 335.....	176
State v. Ellis, 74 Mo. 207.....	160
State v. Erb, 74 Mo. 199.....	160
State v. Estep, 44 Kan. 572.....	521
State v. Fairlamb, 121 Mo. 137.....	521
State v. Felter, 25 Mo. 67.....	371
State v. Hamilton, 57 Iowa, 596.....	496, 538
State v. Harper 101 N. C. 761.....	163
State v. Hopper, 71 Mo. 425.....	480, 521
State v. Jansen, 22 Kan. 498.....	472
State v. Johnson, 40 Conn. 136.....	371
State v. Jones, 50 N. H. 369.....	371
State v. Jones, 77 N. C. 520.....	527
State v. Kotovsky, 74 Mo. 247.....	160
State v. Kyle, 14 Wash. 550.....	78
State v. Maher, 74 Iowa, 77.....	537
State v. Matthews, 40 N. J. Law, 268.....	349
State v. McCafferty, 63 Me. 223.....	121
State v. McClaugherty, 33 W. Va. 250.....	226
State v. Newherter, 46 Iowa, 88.....	371
State v. Miller, 45 Mo. 495.....	503
State v. Partlow, 91 N. C. 550.....	240, 241
State v. Pike, 49 N. H. 399.....	370
State v. Preston, (Idaho) 38 Pac. 694.....	552
State v. Pritchard, 15 Nev. 74.....	363
State v. Rainsbarger, 79 Iowa, 745.....	526
State v. Russell, 90 Iowa, 493.....	520
State v. Stebbins, 29 Conn. 463.....	121
State v. Stickney, 53 Kan. 308.....	472
State (ex rel.) v. Stone, 120 Mo. 423.....	49
State v. Summers, 4 La. Ann. 26.....	480
State v. Superior Court, 5 Wash. 518.....	333
State v. Talbott, 73 Mo. 347.....	160
State v. Taylor, 118 Mo. 153.....	536
State v. Thornton, 41 L. R. A. 530.....	538
State (ex rel.) v. Timme, 56 Wis. 423.....	246
State v. Townsend, 19 Ore. 213.....	520
State v. Trolson, 21 Nev. 419.....	503
State v. Umble, 115 Mo. 452.....	521
State v. Ward, 74 Mo. 253.....	160
State v. Webster, (Wash.) 57 Pac. 361.....	121

TABLE OF CASES CITED.

xxiii

State v. Windsor, 5 Har. (Del.) 512.....	370
Stevens v. State 31 Ind. 485.....	370
Stevens v. Williams, 1 Morr. Min. Rep. 566.....	200
Stilz v. City of Indianapolis, 81 Ind. 582.....	349
Stinchfield v. Gillis, 107 Cal. 86.....	203
Stone v. Hammell, 83 Cal. 547.....	7
Strauch v. Shoemaker, 1 Watts & S. 166.....	349
Stuart v. State, 1 Baxt. (Tenn.) 178.....	372
Sullivan v. Barry, 46 N. J. Law, 1.....	309
Supreme Council v. Forsinger, 125 Ind. 52.....	91
Supreme Lodge v. Raymond, 57 Kan. 647.....	91
Sutherland v. The Governor, 29 Mich. 320.....	49
Sweetser v Dobbins, 65 Cal. 529.....	382
Tayloe v. Sandiford, 7 Wheat. 13.....	280
Taylor v. Com., 109 Pa. St. 262.....	370
The Laura, 114 U. S. 411.....	249
Thomas v. Brady, 10 Pa. St. 164.....	30
Thomason v. Territory, 4 N. Mex. 150.....	521
Tisdale v. Tisdale, 2 Sneed, 596.....	11
Tone v. Brace, 8 Paige, 598.....	309
Tone v. Brace, 11 Paige, 566.....	309
Trust Co. v. Weber, 96 Ill. 346.....	349
Union Trust Co. v. Weber, 96 Ill. 346.....	349, 563
United States v. Chouteau, 102 U. S. 603.....	279
United States v. Hill, 120 U. S. 169.....	249
United States v. Moore, 19 Fed. 39.....	472
United States v. Moore, 95 U. S. 763.....	249
United States v. Relsinger, 128 U. S. 398.....	279
United States v. Slenker, 32 Fed. 691.....	472
United States v. Steenerson, 1 C. C. A. 552.....	421
United States v. Stern, 5 Blatchf. 512.....	246
Van Clief v. Van Vechten, 130 N. Y. 571.....	168, 169
Visher v. Smith, 91 Cal. 260.....	78
Wade v. Commissioners, 74 N. C. 81.....	563
Walker v. State, 102 Ind. 502.....	370
Walters v. State, 29 Ohio St. 215.....	536
Ward v. Ward, 37 Tex. 389.....	241
Warner v. Thomas C. Works, 105 Cal. 409.....	26
Washington v. State, 36 Ga. 222.....	521
West v. Lanier, 9 Humph. 762.....	105
Westerfield v. Bried, 26 N. J. Eq. 357.....	60
Wheeler's Estate, 1 Md. Ch. 80.....	38
White v. Disher, 67 Cal. 402.....	78
Whitney v. Taylor, 158 U. S. 85.....	419
Whitson v. Griffin, 39 Kan. 211.....	443
Williams v. Mitchell, (Kan.) 58 Pac. 1025.....	443
Wilmington, etc. R. R. Co. v. Board, 72 N. C. 10.....	563
Wilson v. State, (Tex.) 36 S. W. 587.....	493

Wilson v. Sullivan, 58 N. H. 260.....	447
Witherspoon v. Duncan, 4 Wall. 210.....	418, 419
Wolverton v. Nichols, 119 U. S. 485.....	414
Wood v. What Cheer Lodge, (R. I.) 35 Atl. 1045.....	91
Wooldridge v. State, 13 Tex. Cr. App. 443.....	522
Yates v. People, 38 Ill. 527.....	121
Zottman v. San Francisco, 20 Cal. 97.....	137

CASES DETERMINED

IN THE

SUPREME COURT

AT THE

MARCH TERM, 1899.

PRESENT:

HON. THEO. BRANTLY, Chief Justice.

HON. WILLIAM H. HUNT, }
HON. WILLIAM T. PIGOTT, } Associate Justices

NORTHWESTERN NATIONAL BANK OF GREAT
FALLS, PLAINTIFF, v. GREAT FALLS OPERA
HOUSE COMPANY, C. M. WEBSTER, J.
BOOKWALTER, H. O. CHOWEN, F. P.
ATKINSON, IRA MYERS AND ER-
NEST CRUTCHER, DEFENDANTS.

23	1
23	31
23	35

ON APPEAL.

F. P. ATKINSON, APPELLANT, v. C. M. WEBSTER,

VOL. XXIII—1

(1)

O. CHOWEN, IRA MEYERS AND ERNEST
CRUTCHER, RESPONDENTS.

[No. 1,089.]

[Submitted April 18, 1899. Decided June 5, 1899.]

*Sureties—Contribution—Release of Cashier—Public Policy—
Consideration—Evidence.*

1. The right of a surety, who has paid a judgment against his principal, and himself and other sureties, to enforce contribution from a co-surety, under the Code of Civil Procedure, Section 1242, which provides that a surety paying a judgment against his principal and himself and other sureties shall be entitled to the benefit of the judgment, to enforce contribution or repayment, if within 10 days after payment he shall file with the Clerk of the Court where the judgment was rendered notice of his payment, and claim for contribution, is not barred by the lapse of 8 years after the payment of a judgment, but exists so long as the judgment is alive; such a proceeding not being an ordinary action within the meaning of Section 559 of the Code of Civil Procedure.
2. Courts will not, as a matter of public policy, enforce a release of a liability of a cashier of a bank, obtained by him in consideration of a loan to the promisor of funds of the bank.
3. An agreement to release a cashier of a bank from a personal obligation, based upon an agreement by him to loan the promisor bank funds, is without consideration.
4. In a proceeding by sureties to enforce contribution from a co-surety on a judgment paid by them, it appeared that the money with which the judgment was paid was borrowed on the individual note of the sureties seeking to enforce contribution; that at the maturity of said note it was paid with money borrowed on the note of the principal judgment debtor, a corporation, which was indorsed by the sureties, who were members of its board of trustees; that the corporation was insolvent, and had been from the time of the payment of the judgment; that its liabilities greatly exceeded its assets; that at the time of the indorsement of the note it was well known by the indorsers, as well as the nonpaying co-surety, who was also a member of its board of trustees, that it would have to be paid by the indorsers; that it is still unpaid; and that the execution of said note was never authorized by the board of trustees, of which fact the co-surety had notice. *Held*, that the sureties had not been reimbursed by the principal debtor for the amount paid by them in satisfaction of the judgment.
5. In an action to enforce contribution, under the Code of Civil Procedure, Section 1242, which provides that a surety paying a judgment upon which he is jointly liable with others as surety shall be entitled to the benefit of the judgment to enforce contribution or repayment, if within 10 days after payment he shall file with the clerk a notice of payment, and claim of contribution, evidence that the execution of the notes on which the judgment paid was entered was authorized by the corporation defendant is immaterial.

*Appeal from District Court, Cascade County; Dudley Du
Rose, Judge.*

ACTION by the Northwestern National Bank of Great Falls against the Great Falls Opera House Company and others. A judgment in favor of plaintiff was paid by Ernest Crutcher

and others, who were sureties for the opera house company, and joint judgment debtors. From an order directing execution to issue in favor of the paying sureties against F. P. Atkinson, the latter appealed. Affirmed.

STATEMENT OF THE CASE.

This is an appeal from an order made and entered in the district court of the Eighth Judicial District, in and for Cascade county, on January 30, 1897, directing execution to issue in favor of C. M. Webster, E. Crutcher, H. O. Chowen and I. Myers against their co-defendant and co-surety F. P. Atkinson.

On the 13th day of December, 1892, the plaintiff in this cause recovered judgment against the Great Falls Opera House Company, a corporation, as principal, and C. M. Webster, J. Bookwalker, H. O. Chowen, F. P. Atkinson, I. Myers and E. Crutcher, as sureties, for the sum of \$1,701.50, with interest at the rate of 10 per cent. per annum from the date thereof until paid, together with plaintiff's costs and disbursements, amounting to \$7.50. On the 17th day of December thereafter, the defendants C. M. Webster, H. O. Chowen, I. Myers and E. Crutcher, claiming that they had paid off the judgment so rendered, with costs and accrued interest, amounting at that time to the sum of \$1,739.50, filed with the clerk of said court a notice of the payment by them of said judgment, and that they claimed contribution from their co-defendant sureties, J. Bookwalker and F. P. Atkinson, and repayment to them by their co-defendant principal in the said debt so paid to the plaintiff, in pursuance of the provisions of Section 348, First Division of the Compiled Statutes of Montana 1887. Thereafter, and on the 27th day of May, 1896, the said Webster, Chowen, Myers and Crutcher served notice upon their co-defendant F. P. Atkinson that they would on the 3d day of June, 1896, or as soon thereafter as they could be heard, move the court to order execution on the judgment in the said action to issue in their favor and against the said Atkinson for the sum of \$341.80, with

interest from the 17th day of December, 1892; said sum being the proportion which he was liable to pay to them in consideration of their having paid the judgment. At the time when this notice was served upon F. P. Atkinson, there was also served upon him, and filed in said court, an affidavit on behalf of the moving parties setting forth the recovery of the judgment aforesaid; that the same was rendered upon a promissory note made by the Great Falls Opera House Company as principal, and the other defendants named therein as sureties; that all the defendants named therein, other than the Great Falls Opera House Company, were liable only as sureties; that they were jointly and severally liable to and bound by the said judgment, and were co-sureties among themselves; that subsequently, and on December 17, 1892, the said Webster, Chown, Myers and Crutcher, being so liable with the other co-defendant sureties, jointly paid the full amount thereof as aforesaid; that they thereupon duly filed with the clerk of the aforesaid court in which the judgment was rendered notice of such payment, and claim to contribution from the defendants Atkinson and Bookwalter; that the defendants Great Falls Opera House Company and Bookwalter were wholly insolvent, and had no property at any time after the 13th day of December, 1892, and up to the time the motion was made, subject to attachment or execution; that said Bookwalter was a nonresident of the state of Montana; that neither Bookwalter nor the Great Falls Opera House Company nor the defendant F. P. Atkinson had paid the said judgment, or any part thereof, nor had either of them paid any part thereof to the moving parties to reimburse them for the payment they had made; that the moving defendants, Webster, Chown, Myers and Crutcher, had paid more than their share of said judgment; and that the sum of \$341.80, with interest thereon at the rate of 10 per cent. per annum from December 17, 1892, was justly due and wholly unpaid by the said Atkinson.

On June 10th thereafter F. P. Atkinson appeared in answer to said motion, and filed his affidavit admitting that he

was one of the defendants in the above entitled action, and a co-surety with the moving defendants. He then denied that the moving defendants, or either of them, did on the 17th day of December, 1892, or at any other time, jointly or otherwise, pay the amount of said judgment, or any part thereof. He denied that the said J. Bookwalter or the Great Falls Opera House Company did not have at any time since the 13th day of December, 1892, any property subject to execution. He alleged that for a long time after the alleged payment of said judgment by the moving defendants the said J. Bookwalter and the Great Falls Opera House Company were both solvent; that the said company had ample property out of which said judgment could readily have been made; and that the said J. Bookwalter had property, subject to execution and unincumbered, sufficient to more than pay his proportion of said judgment. He denied further that the moving defendants, or either of them, had paid more than their proportion of said judgment, or that a sum equal to one-fifth of the same, or any sum whatever, was justly or otherwise due from him to them, or either of them. As a special defense he further alleged that during all the times mentioned he was the cashier of the Cascade Bank of Great Falls, a corporation doing business in the city of Great Falls, and that as such cashier he was authorized to handle and loan its money; that the money with which the judgment referred to in the moving defendants' affidavit was paid on December 17, 1892, was obtained by a note given by the said Great Falls Opera House Company, and that after its maturity, and on or about the 14th day of February, 1893, the said moving defendants, who were sureties upon the said note, having conceived the plan and intention of securing to themselves the property, building and real estate of the Great Falls Opera House Company, in conjunction with others, and with a view of carrying out this plan and intention, and to discharge the indebtedness of the said company on the said note, as well as other indebtedness, borrowed from him, as cashier, or from his bank, on the note of the Opera House Company, indorsed by themselves, and

due in 90 days, \$3,200, with which to pay off the balance of the note given by the said Opera House Company to pay off the said judgment, and that, in consideration of this affiant's consenting to make such loan upon said note, the said moving defendants then and there agreed with the affiant to release him from all liability upon the said judgment referred to in favor of the plaintiff in said cause, and never at any time thereafter to hold him accountable for any part of the same in any wise; and that affiant, in consideration of this promise and agreement on their part, loaned them the said sum of \$3,200, taking therefor the promissory note of the Opera House Company to the bank, indorsed by the moving defendants, with others, and payable as aforesaid, with interest at 1 per cent. per month. As a further special defense, the defendant Atkinson alleged that the claim of the moving defendants for contribution set out in their affidavit was barred by the provisions of subsection 1 of Section 514 of the Code of Civil Procedure of the State of Montana.

Thereafter, on the 28th day of January, 1897, the moving defendants, after notice to defendant Atkinson, moved the said court to strike out of the affidavit of Atkinson all that part of his first special defense stated therein, setting forth the contract between him and the moving defendants under and by virtue of which he was released from his liability upon the judgment recovered by the plaintiff on the 13th day of December, 1892, and also the whole of the said second special defense in which he set up the plea of the statute of limitations. The grounds of the motion were that the matters alleged in the special defenses were frivolous and immaterial, that the alleged contract was void as against public policy, and that the statute of limitations had no application. The motion was sustained. Thereafter, on January 30, 1897, the court, after hearing of proof, directed execution to issue in favor of the moving defendants as prayed for. From this order the defendant F. P. Atkinson appeals.

Clayberg, Corbett & Gunn, W. G. Downing, and W. M. Cockrill, for Appellant.

I. Parker Veazey, for Respondents.

MR. CHIEF JUSTICE BRANTLY, after stating the case, delivered the opinion of the court.

Appellant complains that the court below committed error in the following particulars:

- (1) In striking out his plea of the statute of limitations.
- (2) In striking out his defense of release based upon his alleged contract with respondents.
- (3) In directing execution to issue notwithstanding the proof showed that respondents had been reimbursed for the money expended by them in the payment of the judgment.
- (4) In sustaining the objection of respondents to the introduction as evidence of the minutes of a meeting of the board of trustees of the Opera House Company held on October 5, 1891.

We notice these questions in the order in which they are presented.

1. The contention is made by appellant that this proceeding is an action, within the meaning of the Code of Civil Procedure Section 559, and that the limitation of three years (*Id.* Sec. 514, subdivision 1) is available as a complete defense to respondents' claim. It is true, as claimed by appellant, that the limitation begins to run against the right of a surety to demand reimbursement from his principal, or contribution from his co-surety, as soon as payment is made by him; for, until such payment is made, no cause of action has accrued in his favor. (Wood on Limitations, Sec. 145; *Oppman v. Steinbrenner*, 17 Mont. 369, 42 Pac. 1015; *Chipman v. Morrill*, 20 Cal. 131; *Stone v. Hammell*, 83 Cal. 547, 23 Pac. 703; *Richter v. Henningsan*, 110 Cal. 530, 42 Pac. 1077.) It is also the rule that, in an ordinary action to enforce repayment or contribution, the right of action is not based upon the written instrument upon which the surety was liable to the payee. It is based upon an implied assumpsit for money paid by the surety for the use and benefit of the principal or co-surety. (See authorities cited.) The law implies

the promise upon the part of the principal to indemnify the surety for money paid by the surety for him, and upon the part of the co-surety to bear his share of the burden. Therefore, if this were an ordinary action for contribution, the limitation of three years invoked by the appellant (Sec. 514, subdivision 1, Code of Civil Procedure), would apply, and the claim of respondents would be barred. This proceeding, however, is not an ordinary action within the meaning of Section 559, *supra*. Relief is here sought in a summary way by the respondents under the provisions of Section 348, First Division, Compiled Statutes 1887, brought forward into the Code of 1895 as Section 1242, Code of Civil Procedure. This section provides: "When property liable to an execution against several persons is sold thereon, and more than a due proportion of the judgment is satisfied out of the proceeds of the sale of property of one of them, or one of them pays, without a sale, more than his proportion, he may compel contribution from the others; and when a judgment is against several and is upon an obligation of one of them as security for another, and the surety pays the amount, or any part thereof, either by sale of his property or before sale, he may compel repayment from the principal. In such case the person so paying or contributing is entitled to the benefit of the judgment to enforce contribution or repayment, if, within ten days after his payment, he file with the clerk of the court where judgment was rendered, notice of his payment and claim to contribution or repayment. Upon the filing of such notice, the clerk must make an entry thereof in the margin of the docket." An examination of the provisions of this section leads at once to the conclusion that its purpose is to relieve the paying surety from the necessity of bringing an action to enforce reimbursement or contribution. If a judgment has been rendered against the principal and the sureties, this brings the surety within the class of those who, after payment, may invoke the provisions of the statute for relief. The action has already been had. The judgment fixing the liability of the parties has been entered. The surety paying

for the principal or his co-surety is given "the benefit of the judgment to enforce contribution or repayment," if he gives the notice required in the statute. He is not required to bring suit upon the judgment. No new judgment is contemplated. Otherwise, "the benefit of the judgment" given the surety would be in a large measure nugatory. It is clearly the intention of the provision that the paying surety shall be substituted to all the rights of the plaintiff in the judgment, with the right and privilege of using it, just as the plaintiff could use it, to enforce by the process of execution thereon the payment of such claim as he has. The same provision was construed by the Supreme Court of Minnesota in 1887 in *Ankeny v. Moffett*, 37 Minn. 109, 33 N. W. 320. In this case the court say: "To this right no condition is attached, except that of filing notice of payment and claim to contribution with the clerk of the court within ten days. The benefit of a judgment includes the means of enforcing it by execution. We think that it was the intention of the legislature that the subrogation, in such a case, by operation of law, should be as extensive as that which would occur by express assignment, and that, by payment and filing the required notice, the party paying should be, *ipso facto*, subrogated to all the right of the judgment creditor. If a party attempts to enforce contribution when he is not entitled to it, or for a greater amount than is his due, of course he could be enjoined." The only thing necessary to put the process in motion, after complying with the statute, is for the paying surety to show, after notice to his co-surety (*Davis v. Heimbach*, 75 Cal. 261, 17 Pac. 199; *Clarke v. Austin*, 96 Cal. 283, 31 Pac. 293), that he belongs to the class of persons contemplated by the statute, and the amount of his claim. This being done, the judgment is as efficacious in his behalf against his co-surety as it was originally in favor of the plaintiff against himself. This right would therefore be destroyed only by the death of the judgment from lapse of time. (*Peters v. McWilliams*, 36 Ohio State 155.) The limitation invoked by appellant therefore does not apply, and the action of the trial court in striking out the plea was correct.

2. We think the court below was also correct in striking out the allegation of appellant setting up his contract of release. In assuming the position he did, he sought to maintain the proposition that because, as a trusted officer of the Cascade bank, he had the authority to loan its moneys, he was therefore at liberty to make such agreements with, and exact such promises from, the customers of the bank, as would inure to his own personal profit; and that, too, without reference to his fidelity or disloyalty to his employer. It is a well-settled principle, both in law and equity, that the courts will not lend their aid to enforce contracts and promises, the tendency of which is to place one under wrong influences, or those which offer one a temptation to do what may injuriously affect the rights of third persons. Especially is this true in case of those who occupy fiduciary relations towards the business and property of third persons. They are not permitted to deal with the subject of their trust for their personal advantage. "Loyalty to his trust is the first duty which the agent owes to his principal. Without it the perfect relation cannot exist. Reliance upon the agent's integrity, fidelity, and capacity is the moving consideration in the creation of all agencies. In some it is so much the inspiring spirit that the law looks with jealous eyes upon the manner of their execution, and condemns, not only as invalid as to the principal, but as repugnant to the public policy, everything which tends to destroy that reliance." (Mechem on Agency, Sec. 454.) It follows, therefore, that an agent will not be permitted to put himself in a position where his interests will be antagonistic to those of his principal. "An agreement which tends to lead persons charged with the performance of trusts or duties for the benefit of others to violate or betray them will not be enforced." (2 Beach on Modern Law Contracts, Sec. 1513.) In *Rice v. Wood*, 113 Mass. 133, the court, in speaking of a secret agreement by which a broker was to get a commission from the purchaser of real estate which he had been employed to sell on commission, said: "Contracts which are opposed to open, upright,

and fair dealing are opposed to public policy. A contract by which one is placed under a direct inducement to violate the confidence reposed in him by another is of this character." Cases might be multiplied which recognize and enforce this principle, but the following, which are more or less in point, are deemed sufficient: *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.*, 86 Fed. 929; *Lum v. McEwen*, 56 Minn. 278, 57 N. W. 662; *Bell v. McConnell*, 37 Ohio St. 396; *Bunker v. Miles*, 30 Me. 431; *Miller v. Davidson*, 3 Gilman 518, 44 Am. Dec. 715; *Tisdale v. Tisdale*, 2 Sneed 596, 64 Am. Dec. 775; *Byrd v. Hughes*, 84 Ill. 174; *Noel v. Drake*, 28 Kan. 265; *Atlee v. Fink*, 75 Mo. 100; and *Spinks v. Davis*, 32 Miss. 152. In *Atlee v. Fink*, *supra*, the court say: "One employed by another to transact business for him has no right to enter into a contract with a third person which would place it in his power to wrong his principal in the transaction of the business of the latter, and which would tempt a bad man to act in bad faith towards his employer. The interests of the defendant's employers, and those of plaintiffs, as buyers and sellers, were antagonistic, and defendant could not serve two masters in a matter in which there was such a conflict in their interests." The contract under consideration comes clearly within the rule of these cases. Atkinson put himself by this agreement in a position where the temptation was to be less careful and scrupulous in taking security for the loan, and it is of no moment that in fact the security was good, and that the bank lost nothing by the transaction. So jealous is the law of such transactions, that, if the release had actually been executed, the bank could have made him account for the profit he gained; and, as this was not done, the law will not aid him in the enforcement of it.

But, apart from the question of the validity of the contract viewed from the standpoint of public policy, we do not think it rested upon any consideration. Atkinson did not lend his own money. If the loan was a good one, then his duty to his employer was to make it. If it was not a good one, it was his duty to refuse it, for he cannot be heard to say that he

made a bad loan in violation of his duty. His act in making the loan was therefore the act of the bank, his principal, and the consideration moved from the borrowers to the bank. The bank extended its accommodation, and it was compensated by the payment to it by the borrowers of the interest charged for the accommodation. He furnished no consideration whatever.

3. Appellant contends that the proof shows that the respondents have been reimbursed for the moneys paid by them in satisfaction of the judgment. Upon this point the proof is the following: The judgment was rendered and entered on December 13, 1892, upon a promissory note signed by the Opera House Company as principal and the other defendants as sureties. On December 17, 1892, the respondents borrowed from the plaintiff herein, upon their individual note, the sum of \$4,200. This sum was deposited to the credit of defendant Webster. He thereupon drew out this amount in three checks—one to pay the judgment of plaintiff herein, one to pay off a judgment of the same kind in favor of the Merchants' National Bank and against the Opera House Company, the defendants interested in this controversy, and one Wegner, and one to the account of the Opera House Company. The last was a small balance of \$7. The judgment in favor of the Merchants' National Bank amounted to \$2,242.50. When the note of the respondents fell due, they borrowed from the Cascade Bank, of which defendant Atkinson was cashier, the sum of \$3,200, to be used, with moneys borrowed from other sources, to pay off the \$4,200 due to the plaintiff bank on their individual note. This was done on February 14, 1893. The note to the Cascade Bank was executed in the name of the Opera House Company by H. O. Chowen, as president, and C. M. Webster, as secretary. It was indorsed by them and Myers and Crutcher. Chowen and Webster were in fact trustees and the president and secretary of the corporation. Myers and Crutcher were also trustees. The moneys borrowed from other sources were obtained in the same way. The sum of \$5,000 had been borrowed by them

in January from the State Bank of Minneapolis, Minnesota. The note made to this bank was indorsed by the respondents and one Dickerman. It was also executed in the name of the corporation. After paying off out of this loan some charges for interest upon a mortgage upon the property of the corporation and for insurance, the respondents deposited the balance, about \$3,000, together with the amount obtained from the Cascade Bank, in the Security Bank, to the credit of the corporation. This was done on February 14, 1893. Thereupon the amount of the note due the plaintiff bank was paid by a check of the Opera House Company drawn against this fund. This check was drawn by C. M. Webster, the secretary and treasurer. The note due the Minneapolis bank was afterwards taken up by defendant Myers. This was some time in May, 1893. Since that time the respondents have been paying to Myers individually their share of the interest upon this sum. When the note to the Cascade Bank was paid, the money for that purpose was obtained from the Stockmen's National Bank, at Fort Benton, Montana. The note given for this was signed by the Opera House Company, by its president and secretary, and was indorsed by the respondents, with A. W. Kingsbury, Theo. Gibson, and John Lepley. This was done on November 1, 1893. After that date this note was renewed from time to time, and was still due and unpaid at the date of the hearing herein. At the time these transactions took place, the property of the corporation, consisting of the building and the lots occupied by it, was mortgaged for \$22,000. The corporation was also indebted, besides this sum, to the amount of \$15,000 to \$20,000. The mortgage was subsequently foreclosed, and the property sold to satisfy it. The property realized \$17,000, leaving a deficiency judgment for the trustees of the corporation to pay. There were nine of these trustees, the appellant and the respondents being of the number. The various transactions with the Cascade, Stockmen's, and Minneapolis banks were had without any meeting of the board of trustees, and without consultation with them by the respondents, they

acting with Kingsbury, Lepley, and Gibson in case of the transaction with the Stockmen's and Cascade banks, and with Dickerman in the transaction with the Minneapolis bank. Kingsbury, Lepley, Gibson, and Dickerman were not trustees.

All the parties interested knew fully the conditions surrounding the corporation, and the purposes for which the moneys were being borrowed. All knew that the corporation was insolvent in 1892, that it remained so, and that, besides the mortgage indebtedness secured by the lien upon its property, it owed large amounts. All knew that the enterprise was an unfortunate one, and that ultimately the liability incurred, both upon the notes in the judgments and upon the loans afterwards secured, was personal. All were anxious to escape the perils of the wreck that had overtaken them, and to avoid further loss. The appellant understood this as well as the respondents. He was a member of the board of trustees, and, if the respondents are to be charged with responsibility for acting for the corporation, he should be held to share the responsibility with them, because he dealt with them with full knowledge of the conditions. He therefore does not stand in the attitude of a stranger to the enterprise, trying to recover from the defunct corporation or from its officers upon a liability based upon representations made by them. He knew that they were acting, not as a board, but as individuals, and that as to him and them the corporation was not bound.

It is the rule that those who act as officers of a corporation cannot deny their authority to so act, when the rights of third parties are in question. But the appellant stands in no attitude to invoke this principle. He incurred no liability upon the faith of anything respondents have done, nor was he in any way deceived or misled by them to his injury. The banks from which the loans were obtained could properly say, perhaps, that these officers and the corporation are estopped to deny liability; but he, from his relation to it and them, cannot make this claim. Under the facts surrounding these transactions, we think it would be inequitable and unjust to

permit the appellant to escape liability to bear his part of the common burden. We do not think that the status of the debt incurred by the respondents to raise the money to pay the judgment on December 17, 1892, was in any way changed by their subsequent behavior with reference to it. Nor do we think that their use of the corporation's name in executing the notes upon which they afterwards borrowed the money with which to pay it puts them in such a position, under the facts, that it can be fairly said that they have been reimbursed by their principal.

4. The minutes of a meeting of the board of directors held on October 5, 1891, were offered in evidence by counsel for appellant for the purpose of showing that the notes upon which judgments were entered in this case, and also in the case of the Merchants' National Bank, (23 Mont., 57 Pac. 445), were authorized by the corporation. Upon objection, these were excluded. There was no error in this. It was claimed by respondents that they were authorized. Judgments had already been entered upon them. The appellant was a surety upon them, and judgment had been entered against him. The evidence was immaterial and wholly foreign to the investigation. It could only serve to incumber the record.

Let the order appealed from be affirmed.

Affirmed.

MR. JUSTICE PIGOTT, having been of counsel, took no part in this decision.

STATE EX REL. KAISER WATER CO., RESPONDENT, v.
CITY OF PHILIPSBURG ET AL., APPELLANTS.

[No. 1264.]

[Submitted May 8, 1899. Decided June 8, 1899.]

Water Company—Contract with City—Municipal Corporations—Mandamus—Adequate Remedy at Law.

1. Under a contract by a city with a water company by which the latter has to furnish and keep in working order 15 fire hydrants for a period of 10 years at a rental of \$112 per annum, the city to have the right at any time within 10 years "to take any additional number of fire hydrants at the annual rental of one hundred dollars each," the city ordering additional hydrants, is liable for their rent for the remainder of the period of ten years, and not merely until the order is rescinded.
2. Mandamus will lie to compel a city to audit and pay a bill which it owes to a water company for hydrant rent, although Political Code, Section 4703, provides that cities may sue or be sued in all courts and places.

Appeal from District Court, Granite County; Theo. Brantly, Judge.

APPLICATION for mandamus on the relation of the M. & J. Kaiser Water Company against the City of Philipsburg and others. Judgment for plaintiff against defendant City of Philipsburg, and it appeals. Affirmed.

STATEMENT OF THE CASE.

Appeal from a judgment awarding to the plaintiff (respondent here) a writ of mandate requiring the defendant (appellant here) to audit, allow, approve, and pay the bills of the plaintiff water company for water furnished the city of Philipsburg at the rate of \$112.50 per annum for each of fifteen hydrants, and at the rate of \$100 per annum for each of four more, during the life of the water company's franchise.

The petition for the writ of mandate avers the corporate capacity of the plaintiff water company, the municipal incorporation of the defendant, the City of Philipsburg, and that the other defendants are, respectively, the mayor, aldermen,

and clerk of said city. It is then averred that on January 5, 1893, a franchise was granted by ordinance to Michael and John Kaiser to lay pipes through the streets of Philipsburg, and to supply the city and its inhabitants, through them, with water for a period of ten years; that at the same time another ordinance was passed, in the nature of a contract for the supplying of the city with water, which provided as follows:

“Now, therefore, in consideration of the said franchise, and of the completion and maintenance of the said water system according to contract, and for the further consideration of one hundred twelve and one-half dollars (\$112.50) per annum per hydrant, the said Town of Philipsburg hereby contracts with the said Michael Kaiser and John Kaiser, their successors and assigns, for the use of fifteen nonfreezing, double-discharge fire hydrants, to be supplied to said town for the period of ten years from the time in the year 1893 that said water system is completed and said hydrants ready for use. Said hydrants to be always kept in working order by said Michael and John Kaiser, their successors and assigns, and to be always charged with water in quantity and pressure according to contract of said Michael and John Kaiser with said town. Said Town of Philipsburg to have the right at any time during said period of ten years to take any additional number of fire hydrants at the annual rental of one hundred dollars each. Said fire hydrants to be placed throughout the town of Philipsburg as directed by the board of aldermen, and not to be used for any purpose whatever except by the authorities of the town of Philipsburg.”

It is then averred that the M. & J. Kaiser Water Company succeeded to the franchise and other rights of Michael and John Kaiser, and that the City of Philipsburg is the successor of the Town of Philipsburg; that under the said ordinance the petitioner's plant was installed and operated with fifteen hydrants until August 1, 1895, when the city required the water company to put in four more hydrants, as provided for in the ordinance, which the petitioner did at a cost of about \$1,000; that the city paid the petitioner all its bills presented

monthly thereafter, as provided for in the ordinance, until the presentation of the bill of October, 1897, which the city refused to pay so far as it included amounts charged for the new hydrants, notice having been theretofore served by the city upon the water company that on and after October 1, 1897, it would discontinue the use and hiring of the four additional hydrants; that the hydrants are valueless except to the City of Philipsburg; and that the water system is kept supplied, and the additional hydrants are always ready for use.

The city interposed a general demurrer to the petitioner's application. A special demurrer was interposed by the individual defendants. The special demurrer was sustained, but the general demurrer was overruled. The City of Philipsburg elected to stand on its demurrer. Judgment was thereafter entered in favor of the petitioner and against the city. From this judgment the appeal is taken.

Messrs. Durfee & Brown, for Appellants.

The alleged rights of the respondent under this contract were not so supreme, or so jeopardized as to alter the relationship of ordinary creditor and debtor, an action at law is its proper and appropriate remedy in this case, and all of its alleged rights could be safely and adequately protected in such action; and to seek by the arbitrary and summary method invoked by it in this cause to collect an alleged debt is contrary to law, equity, reason or practice.

Section 4703 of the Political Code grants the respondent a plain, speedy and adequate remedy, and having this, is by its very terms denied the privilege of the writ of mandamus.

In the case of *Crandell v. Amador County*, reported in 20 Cal., p. 75, that court adopts the language of Mr. Justice Harris in the case of the *People v. Thompson*, reported in 25 Barb., p. 73, as follows: "The invariable test by which the right of a party applying for a mandamus is determined, is to enquire, *first*, whether he has a clear, legal right, and if he has, then, *secondly*, whether there is any adequate remedy to

which he can resort to enforce his right; if there is, he cannot have a mandamus. The writ only belongs to such as have legal rights to enforce, and find themselves without an appropriate legal remedy. To prevent a failure of justice, and only for this, the court will avail itself of this extraordinary power." That such has been the one and uniform ruling of the courts, see: *Price v. City of Sacramento*, 6 Cal., 255; *Tilden v. Sacramento Co.*, 41 Cal., 68; *Lewis v. Barclay*, 35 Cal., 213; *Jacobs v. Board of Supervisors City and County of San Francisco*, 100 Cal., 121; *Dillon on Municipal Corporations*, Sec. 97; 17 Pac. Rep., 135. Counsel for respondent seem to rely wholly for a decision in this case on that rendered by this Court in *State ex rel. Great Falls Water Works v. City of Great Falls*, 19 Mont., 518; 49 Pac., 15. We claim, however, that the cause at bar and the Great Falls case are in no sense analogous,—both the conduct of the cause and the confessed facts differ materially in this. The law as stated in *Price v. City of Sacramento*, and followed by the authorities heretofore cited, in our opinion, is the correct and most reasonable rule.

Mr. T. J. Walsh, for Respondent.

MR. JUSTICE HUNT, after stating the case, delivered the opinion of the court.

1. The City of Philipsburg refuses to pay the bill of the water company for the four additional hydrants it ordered the water company to put in, upon the ground that, under the clause of the contract ordinance which is quoted in the statement of the case, when the city ordered additional hydrants it entered into a *yearly* lease with the water company to hire such additional hydrants, and that, having an option to take the additional hydrants, it also had the option to stop the hiring at the end of a year, at the election of the city. Relying upon this construction of the contract, the city seeks to maintain the position that it elected to terminate its lease of the four additional hydrants it had ordered, and to discon-

tinue the use of them, at the end of the second year's lease, after paying in full for the same. But in our opinion the agreement cannot receive that construction. Following the familiar principle that courts will not make an agreement for persons, but will get at what their agreement is, we will look to the written words voluntarily employed by these parties, and to the effect of their language. We will also look at the whole of the ordinance constituting the contract, giving to every clause, and, if needs be, to every word thereof, a meaning,—all with a purpose to so construe the contract as to make effectual the objects and intentions of the parties.

It is perfectly plain that for the fifteen hydrants first mentioned in the contract the city was to pay for ten years from the time in the year 1893 that the water system was completed and the fifteen hydrants were ready for use. As to this there is no room for argument. The then present needs of the city, and the apparent certain future needs thereof, justified the agreement whereby fifteen hydrants should be taken, and kept supplied and ready for use for 10 years, at an annual rental of \$112.50 per annum per hydrant. Doubtless a possible decrease of the city's population, followed by requirements for less fire protection, was not considered of sufficient likelihood for the city to reserve to itself in the contract a right to discontinue the use of less than fifteen hydrants for the fixed period of ten years. But, whatever may have moved the parties in respect to the fifteen hydrants, they made express provision for increased needs, if they should occur, by that clause of the contract which gave to the city the right at any time during the period of ten years for which the fifteen hydrants were taken to take any additional number of hydrants at an annual rental of \$100 each. Acting upon this clause of the agreement, and presumably to meet the necessities of the municipality, the city took the four additional hydrants, requiring the water company to put them in, which it did at an expense of \$1,000. As we interpret the agreement, the city had no right to order and take these additional hydrants upon any other basis than that upon which

it took the first fifteen hydrants, except in so far as it was expressly otherwise provided for in the ordinance itself. The stipulated annual rental of \$100 for each additional hydrant, which was \$12.50 less than for the first fifteen, is a circumstance tending to show that the meaning of the parties was that additional hydrants, if taken, would be kept in use for a substantial period of time, which we construe to mean for as many years after the taking as there might be left to run under the ten-year period fixed for taking the fifteen hydrants. It is reasonable to believe that some period of time was in the minds of the contracting parties, during which the city would be obliged to pay for the additional hydrants; but we find nothing in the language used to warrant the construction that the period contemplated was one year only, or the lease a yearly one, subject to termination at the end of that time.

As we construe the contract, too, the obligation rested upon the water company to keep these additional hydrants supplied, and always in working order, charged with water in quantity and pressure according to the contract with the town made by the water company's predecessors, just as fully as it developed upon it to keep the fifteen hydrants charged and ready. In other words, we are satisfied that the obligations of the contract imposed upon the water company in respect to the fifteen hydrants for ten years rested upon the company equally, as relates to all additional hydrants for the years they had to be supplied, while, on the other hand, the correlative duty lay upon the city to pay for the additional hydrants in the same manner and from the time they were taken until the lapse of the same period provided for in relation to the fifteen hydrants. This construction insures for the city a water supply to meet its growth, and avoids the very unreasonable view that either party can refuse to perform or revoke without just cause.

As we regard it, the clause pertaining to additional hydrants, and stipulating for an annual rental therefor, was inserted, not to abbreviate the period of the contract's duration, which is ten years from the date that the fifteen hydrants were ready

for use, and is for as many years' use of the additional hydrants as there may be between the date of their taking and the time that the ten years will expire since the taking of the fifteen hydrants, but was to secure to the city an adequate water supply to meet its possible future necessities, and to make certain that such supply would be furnished at a reasonable and fixed price per hydrant. The particular obligations resting upon the parties in case additional hydrants should be taken, though not set forth in express terms, must be ascertained by reference to that part of the provision of the contract governing the fifteen hydrants. We have therefore read all the provisions together, and concluded that the ten-year clause and those parts of the provision which require the supply to be furnished under certain pressure, and to be kept in working order, cannot be disassociated from the clause authorizing additional hydrants, but is to be construed with it.

2. The next contention of the city is that the water company having a plain, speedy, and adequate remedy at law, under Section 4703 of the Political Code, *mandamus* will not lie. Section 4703 provides, in part, that every city organized under Title III of the Political Code, relating to cities and towns, may sue and be sued in all courts and places, and in all proceedings whatever, and has such other powers as are incident to municipal corporations, not inconsistent with the laws of the United States or of the state. The rule established by Section 4703 was in force, however, at the time of the decision of this Court in *State ex rel. Great Falls Water Works v. Mayor of Great Falls et al.*, 19 Mont., 518; 49 Pac.

15. In that case the court was obliged to pass directly upon the question whether or not *mandamus* will lie to compel a city to perform a duty imposed upon it by law,—to audit and allow proper bills it owes under the terms of a contract for a water supply, and to issue its warrant for the payment of the bills. It was held *mandamus* was a proper remedy. We cannot distinguish this case from that. It is true, as appears by the record, no demurrer was interposed in the Great Falls case; but the question of the sufficiency of the petition was

raised by an objection to the introduction of any evidence on the ground that no cause of action for a writ of *mandamus* was pleaded. We will not depart from the rule there announced, in this case, where the facts are so very similar. This disposes of the only questions relied on in argument and brief.

Judgment affirmed. Remittitur forthwith.

Affirmed.

MR. JUSTICE PIGOTT: I concur with Mr. Justice Hunt in his interpretation of the contract, and in the conclusion stated in the first paragraph of the foregoing opinion.

In holding that *mandamus* is a proper remedy, the second paragraph of the opinion follows *State ex rel. Great Falls Water Works v. Mayor of Great Falls et al.*, 19 Mont. 518, 49 Pac. 15. I doubt the correctness of that decision in the respect mentioned, but "*stare decisis et non quieta movere.*"

MR. CHIEF JUSTICE BRANTLY, being disqualified, took no part in this decision.

PATTEN, APPELLANT, v. HYDE, RESPONDENT.

[No. 1234.]

[Submitted May 8, 1899. Decided June 5, 1899.]

New Trial—Setting Aside Verdict—Specifications.

1. The Supreme Court will not disturb the action of a trial judge in setting aside a verdict, where he is satisfied that it is not warranted by the evidence.
2. Specifications are sufficient to point out the particulars in which evidence is claimed to be insufficient to justify a verdict, which give the opposite party notice, and advise the court in plain language of the matters that would be urged on the hearing.

Appeal from District Court, Granite County; Theo. Brantly, Judge.

Action by James Patten against Joseph A. Hyde. There

23	23
123	204

23	23
26	72

23	23
27	11
27	13

23	23
29	227

23	23
33	327

23	23
34	486

23	23
36	416

23	23
38	366

was a verdict for plaintiff. From an order granting defendant a new trial, plaintiff appealed. Affirmed.

Mr. T. J. Walsh, and Messrs. Rodgers & Rodgers, for Appellant.

Mr. W. E. Moore, and Messrs. Durfee & Brown, for Respondent.

PER CURIAM.—Plaintiff (appellant) sues the defendant (respondent) for \$750, together with interest, alleged to be due him upon a rescission of a sale of certain banking interests by the defendant to plaintiff and others.

Plaintiff's complaint alleges that on the 4th day of April, 1893, the plaintiff and one Freyschlag and one Reins bought, and the defendant sold to them, a two-fifths interest in and to the capital stock of the First National Bank of Philipsburg, and in and to the banking firm of Hyde, Freyschlag & Co., and in and to the Joseph A. Hyde Banking Company, each of said persons agreeing to buy and to take for himself a one-third of said two-fifths interest; that in consideration of said sale the said parties agreed to pay to the said defendant the sum of \$52,250, and did pay him \$2,250 in cash, and gave him their promissory note for the sum of \$50,000, payable on April 4, 1894; that afterwards, on the 28th day of July, 1894, it was mutually agreed between said defendant and the said plaintiff, Freyschlag, and Reins, that the said sale should be rescinded, and that the said defendant should return to them for cancellation the \$50,000 note, and should repay to each of said persons his proportionate share of said \$2,250 which had theretofore been paid; that thereupon the plaintiff, Freyschlag, and Reins, relinquished all their claim to said banking interest, and Hyde became the owner thereof; that Hyde released to the plaintiff and to Freyschlag and Reins the \$50,000 note for cancellation, but refused to pay to the plaintiff his proportionate share of said \$2,250.

The answer denies that defendant ever agreed with plaintiff, Freyschlag, and Reins, or either of them, that upon the re-

sumption of the ownership of the two-fifths interest in the banking institutions he would repay to plaintiff, or to each of said persons, or to either or any of them, his proportionate share, or any share, of the \$2,250, as alleged in the complaint, or at all; and denies that there was any agreement whatever that all or every person a party to the said contract, as alleged, should be placed in exactly the same position in relation to the said \$2,250, or that there should be any change of position at all of any of said parties with reference to the said sum, by reason of said rescission of the contract. The defendant alleges that at the time of the rescission, as alleged in plaintiff's complaint, it was agreed between plaintiff, Freyschlag, and Reins, and defendant that, in consideration of the rescission of the contract by defendant, he (defendant) should retain the said \$2,250, and that no part of said sum should be repaid to plaintiff, Freyschlag, or Reins, or either of them, but that the return and cancellation of the said note for \$50,000 was the only consideration that the said plaintiff, Freyschlag, and Reins, or either of them, was to receive for said rescission of said contract.

The cause was tried before a jury, and a verdict rendered in favor of the plaintiff for the full amount sued for, and judgment was entered thereon. Defendant moved for a new trial, which motion was granted. Plaintiff, Patten, appeals from the order granting a new trial.

The district court granted a new trial on the grounds that under the allegations of the complaint the contract sued on was a joint one, while the evidence showed that, if any contract at all was made between the plaintiff and the defendant, it was several and separate, wherefore there was such a variance between the pleadings and the proof that defendant's motion for a nonsuit ought to have been granted during the course of the trial, and because the evidence was insufficient to justify the verdict.

The question of whether or not there was a variance between the allegations of the pleadings and the proof which was material under the Code of Civil Procedure (Sections

770-772) need not be decided, for the plaintiff may amend before the case is tried again.

We have examined the testimony contained in the record, and find no good reason for disturbing the action of the district court in granting a new trial upon the ground that the evidence is insufficient to justify the verdict. It is thoroughly well settled that if a judge before whom a case is tried is satisfied that a verdict is not warranted by the evidence, he should set it aside upon proper motion. (*Hamilton v. Nelson*, 22 Mont. 539, 57 Pac. 146; *In re Carriger's Estate*, 104 Cal. 81, 37 Pac. 785; *Ray v. Cowan*, 18 Mont. 259, 44 Pac. 821; *McCauley v. Tyler*, 11 Mont. 51, 27 Pac. 391; *Murray v. Heinze*, 17 Mont. 353, 42 Pac. 1057, and 43 Pac. 714; *Menard v. Montana Central Railway Co.*, 22 Mont. 340, 56 Pac. 592; *Jones v. Sanders*, 103 Cal. 678, 37 Pac. 649; *Warner v. Thomas Cleaning Works*, 105 Cal. 409, 38 Pac. 960.)

We think that the specifications are sufficient to point out the particulars in which the evidence is alleged to be insufficient to justify the verdict. They are not as explicit in form as they might have been if they had strictly followed the rule approved of in *First National Bank v. Roberts*, 9 Mont. 323, 23 Pac. 718, and *Strasburger v. Beecher*, 20 Mont. 143, 49 Pac. 740; but they certainly gave the plaintiff notice, and advised the court in plain language of the matters that would be urged on the hearing of the motion. *Harnett v. Central Pacific Railroad Co.*, 78 Cal. 31, 20 Pac. 154.

The order granting a new trial is affirmed. *Reinstitur* forthwith.

Affirmed.

MR. CHIEF JUSTICE BRANTLY, being disqualified, took no part in this decision.

GALLAGHER ET AL., RESPONDENTS, v. CORNELIUS ET AL., APPELLANTS.

[No. 1,095.]

[Submitted April 20, 1899. Decided June 5, 1899.]

Appeal—Jurisdiction—Dismissal—Review—Record—Trial by Referee—Findings—New Trial—Contract of Indemnity—Municipal Corporations—Defense.

1. An appeal from a judgment, not taken within one year after its entry, as required by Compiled Statutes 1887, Division 1, Section 421, and Code Civil Procedure 1895, Section 1723, will be dismissed for want of jurisdiction.
2. Where it does not appear from the record that appellant requested findings in writing by a referee, as required by Code Civil Procedure, Section 1114, as a condition to reversal for want of findings, he cannot complain of the referee's failure to make findings.
3. Unless objections and exceptions to findings of a referee, for defects therein, are settled in a bill or statement, as required by Code Civil Procedure, Section 1115, they are not properly a part of the transcript on appeal, and will not be considered.
4. Errors of law on appeal from an order refusing a new trial cannot be reviewed where a specification of such errors was omitted from the statement of the case on the motion therefor.
5. That an alderman made an illegal contract with a city to construct a sewer is no defense to his contract to indemnify a third person for his payment of debts incurred in its construction, and expenses in excess of the stipulated price in completing the sewer according to contract.

Appeal from District Court, Cascade County; C. H. Benton, Judge.

Action by P. B. Gallagher, and another against J. W. and Minnie Cornelius, in which Morgan Cornelius intervened. From a judgment in favor of plaintiffs, and from an order refusing a new trial, defendants and the intervener appeal. The appeal from the judgment is dismissed, and the order is affirmed.

Mr. T. E. Brady, Mr. James Donovan, Mr. F. A. Merrill and Mr. M. M. Lyter, for Appellants.

PER CURIAM.—This action was brought to foreclose a lien in the nature of a mortgage upon certain real and personal

23	27
23	390
23	27
24	114
24	124
24	235
23	27
25	271
23	27
26	496
26	502
23	27
31	118
32	163

property alleged to have been transferred to the plaintiffs by the defendants, J. W. Cornelius and Minnie Cornelius, as security for the indemnity and protection of the plaintiffs against any loss or damage resulting to them from the payment by them of certain debts theretofore incurred by J. W. Cornelius in the part performance of a certain contract for the construction of a sewer, awarded by the City of Great Falls to one Scotten for the secret benefit of J. W. Cornelius, who was the real contractor, and from outlay incident to the completion by them of said sewer at the request of J. W. Cornelius, and upon his express promise to reimburse them for all expense in excess of the price stipulated to be paid by the city for the faithful performance of the contract by Scotten. The plaintiffs, in pursuance of the request of the defendant J. W. Cornelius, paid for him the said debts, and completed the sewer according to the terms of the contract. The complaint seeks also a personal judgment against J. W. Cornelius for \$6,348.14, that sum being the difference between the said contract price and the total of the expenses paid by the plaintiffs. Several defenses were pleaded by the defendants, J. W. Cornelius and Minnie Cornelius. Morgan Cornelius intervened, claiming to own the horse "Montana Sneak" and the steamboat "Minnie," which were included in the bill of sale made by defendants, J. W. Cornelius and Minnie Cornelius, to the plaintiffs. The case was tried by a referee, who found for the plaintiffs, and a judgment was entered in their favor. The defendants moved for a new trial, which was denied, and they appeal from the order refusing a new trial and from the judgment. Respondents have not appeared in this court.

1. The attempted appeal from the judgment must be dismissed for want of jurisdiction. The judgment was entered on the 15th day of October, 1895, and the notice of appeal was filed and served on the 2d day of March, 1897,—more than one year after its entry. Section 421, First Division, Compiled Statutes 1887 (Sec. 1723, Code of Civil Procedure, 1895.)

2. The defendants complain of the failure of the referee

to make express findings on every issue, and they contend the findings that were made are defective. But it does not appear that the defendants requested findings in writing, as is required by Section 1114 of the Code of Civil Procedure. It is true, there is inserted in the transcript a paper containing objections and exceptions made by defendants to the findings for defects therein; but this paper is improperly in the transcript, and will not be considered, for the reason that it is not settled in any bill or statement. Sections 1114, 1115, Code of Civil Procedure.

3. Insufficiency of the evidence to justify the decision, and errors in law occurring at the trial, are the grounds upon which, in their notice of intention, the defendants say they will move for a new trial; but the omission from the statement of the case on such motion of any specification of errors in law restricts our investigation to a consideration of the evidence. The specifications of the particulars in which the evidence is insufficient to justify the findings are in proper form, but they are wholly lacking in substance and in merit. There is no need of incumbering the opinion with an abstract of the evidence. Suffice it to say that there was evidence, ample and abundant, tending to prove the truth of every material allegation of the complaint, and the falsity of all those averments of the answers which stated defenses. A careful reading of the testimony reveals neither failure of proof upon the part of the plaintiffs nor a preponderance of the evidence against them. On the contrary, examination of the evidence, as it appears in type, inclines us to the view that the referee was clearly right in determining the issues in favor of the plaintiffs, and that the court wisely refused a new trial.

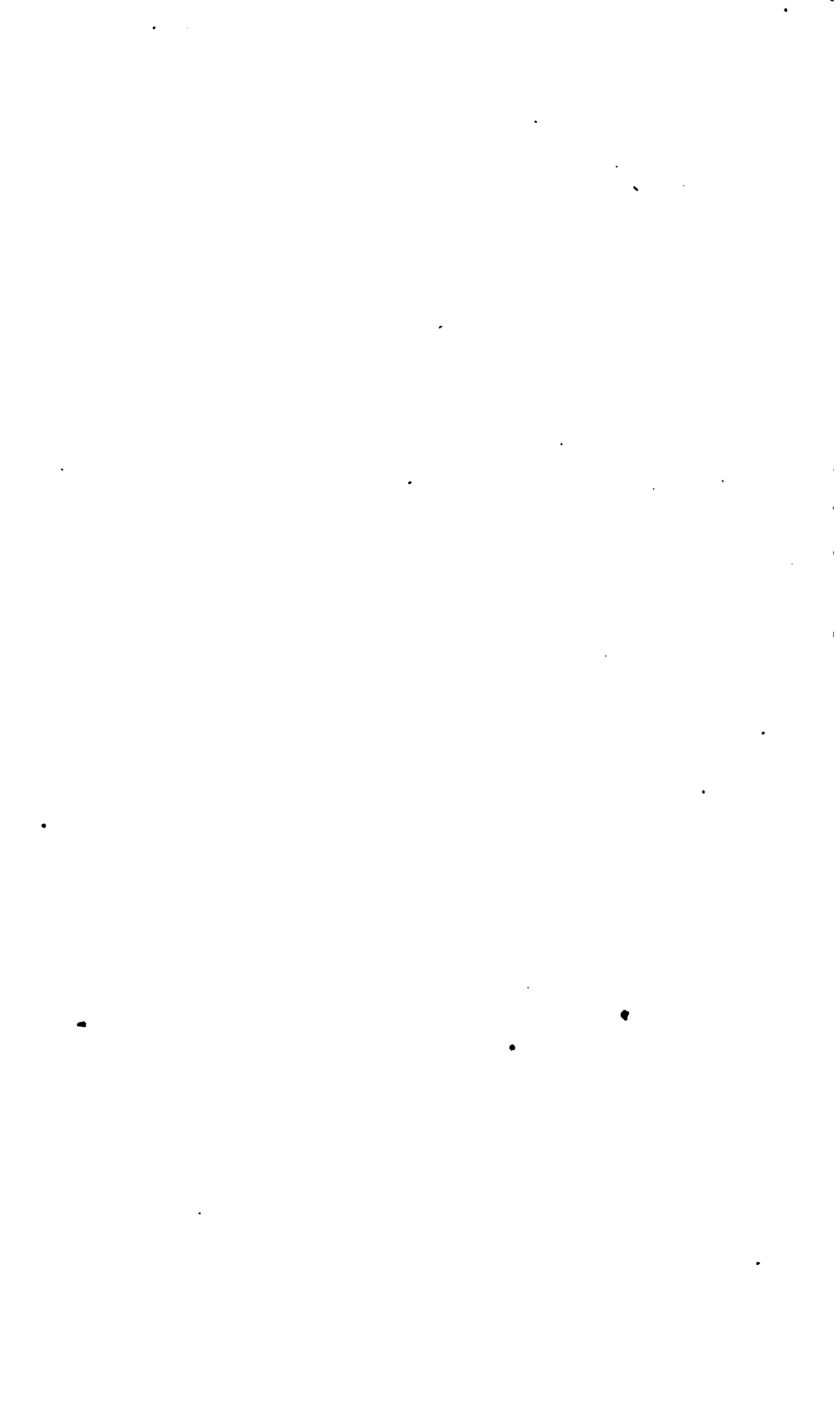
One of the defenses interposed is that the defendant J. W. Cornelius, while an alderman of Great Falls, entered into the contract with that city, which is mentioned in the complaint; that the contract was awarded to said Scotten for the benefit of Cornelius, who was the real party in interest; that plaintiffs well knew these facts, and that the present suit is founded upon certain agreements and conveyances which were made

between the plaintiffs and J. W. Cornelius for the purpose of indemnifying them against loss as sureties upon a bond executed by him and them to secure his performance of the contract theretofore awarded to him (in the name of Scotten) by the city, and to protect them from any pecuniary injury which might thereafter result from their completing the work,—they having, at his request, and because of his inability, subsequently finished the construction of the sewer. The defendants contend that the agreements and conveyances upon which the action at bar is based grew out of, and are so intimately connected with, the contract entered into between the city and Cornelius, as to taint the former with the illegality inherent in the latter. No case declaring such a doctrine to be applicable to the facts here disclosed is cited; indeed, no adjudication or reason whatsoever is called to our attention, or advanced in support of the position. Sections 345, 375, Fifth Division, Compiled Statutes 1887, provide, among other things, that an alderman shall not be a party to nor interested in any contract, or the profits thereof, made by the city or town while he is in office. The sewer contract between the city and Scotten, *alias* Cornelius, was indirectly connected with the transactions out of which the plaintiffs' cause of action arose. The proofs, however, satisfy us that the subject of the present suit is not "contaminated by the turpitude of the offensive" contract. Plaintiffs do not require the aid of the illegal contract to support their case. They are suing upon an express promise by Cornelius to reimburse them for money expended at his request, and upon a new and legal consideration. They may recover independently of the prohibited contract, to which they were not parties, and which is a mere item of evidence, or only an incident. "So, also, if an act in violation of either statute or common law be already committed, and a subsequent agreement entered into, which, though founded thereupon, constituted no part of the original inducement or consideration of the illegal act, such agreement is valid." (Story on Contracts, Sec. 760; 2 Beach on Modern Law of Contracts, Sec. 1416; *Thomas v. Brady*, 10 Pa. St.

164, 170; *Armstrong v. Toler*, 11 Wheat. 258; 6 Law. Ed. U. S. Sup. Court Rep. 468; *Armstrong v. American Ex. National Bank*, 133 U. S. 433, 10 Sup. Court 450.) Nothing in *Morrison v. Bennett*, 20 Mont. 560, 52 Pac. 553, or *Northwestern Nat. Bank v. Great Falls Opera House Co.*, (this day decided) ante 1, 57 Pac. 440, conflicts herewith. The contract sued on in the case at bar is subsequent and collateral to the prohibited contract, and does not partake of the illegality with which the latter was infected.

The appeal from the judgment is dismissed. The order refusing a new trial is affirmed. Let remittitur issue forthwith.

Affirmed.



CASES DETERMINED

IN THE

SUPREME COURT

AT THE

JUNE TERM, 1899.

PRESENT:

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. WILLIAM H. HUNT, } Associate Justices.
THE HON. WILLIAM T. PIGOTT, }

MERCHANTS NATIONAL BANK OF GREAT FALLS,
PLAINTIFF, v. GREAT FALLS OPERA HOUSE COM-
PANY, C. M. WEBSTER, CHAS. WEGNER, H.
O. CHOWEN, F. P. ATKINSON, IRA
MYERS AND ERNEST CRUTCHER,
DEFENDANTS.

ON APPEAL

F. P. ATKINSON, APPELLANT, v. C. M. WEBSTER, H. O.
CHOWEN, AND ERNEST CRUTCHER, RESPONDENTS.

[No. 1,088.]

[Submitted April 18, 1899. Decided June 6, 1899.]

*Principal and Surety—Judgment—Contribution—Remedy—
Evidence.*

1. A surety who has paid a judgment against his principal and himself and others as sureties may take an assignment of the judgment to himself, and enforce contribution from his co-sureties; the remedy afforded by Code Civil Procedure, Section 1242, which provides that a surety paying such a judgment may have the benefit of it to enforce repayment and contribution, if within ten days after payment he files with the clerk a notice of payment and claim of repayment and contribution, not being exclusive.
2. A judgment against a principal and sureties was paid by one of the sureties, who took an assignment of it to compel contribution from his co-sureties. Thereafter the judgment was, at the request of the paying surety, satisfied of record to relieve the real estate of the paying surety from the lien. It was intended to have it satisfied only as to the paying surety. *Held*, that as to a co-surety who paid no consideration for it, such satisfaction did not release his liability to contribute.
3. In a proceeding to enforce contribution from a co-surety, by a surety who has paid and taken an assignment of a judgment against them, it is competent for the paying surety to testify that he did not intend to have the judgment satisfied as to his co-surety, where he had, after payment and assignment of the judgment, procured a formal satisfaction of it to release his real estate from the apparent lien thereof.

*Appeal from District Court, Cascade County; Dudley Du
Bose, Judge.*

ACTION by the Merchants' National Bank of Great Falls against the Great Falls Opera House Company and others. A judgment in favor of plaintiff was paid by Ernest Crutcher and others, who were sureties for the opera house company, and joint judgment debtors. From an order directing execution to issue in favor of the paying sureties against F. P. Atkinson, the latter appealed. Affirmed.

*Messrs. Clayberg, Corbett & Gunn, Mr. W. G. Downing,
and Mr. W. M. Cockrill, for Appellant.*

Mr. I. Parker Veazey, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This is an appeal from an order made and entered in the district court of the Eighth judicial district in

and for Cascade county on January 30, 1897, directing execution to issue in favor of C. M. Webster, H. O. Chowen, and Ernest Crutcher against their co-defendant and and co-surety, F. P. Atkinson.

On December 22, 1892, the plaintiff herein recovered judgment against the Great Falls Opera House Company, a corporation, as principal, and C. M. Webster, Charles Wegner, H. O. Chowen, F. P. Atkinson, Ira Myers, and Ernest Crutcher, as sureties, for the sum of \$2,242.50, with interest at 10 per cent. per annum from the date thereof. The motion for execution herein against F. P. Atkinson was made upon the same day as the motion made in the case of *Northwestern National Bank v. Great Falls Opera House Co., et al.*, ante p. 2, 57 Pac. 440. It was heard at the same time, and upon substantially the same proof. The right to contribution from Atkinson in this case, however, is based upon a formal assignment of the judgment by the plaintiff to the moving defendants after payment of the same by them. This payment was made on December 23, 1892, and the facts with reference to it are set forth in full in the opinion in *Northwestern National Bank v. Great Falls Opera House Co., et al.*, supra. The affidavit of the moving defendants herein differs from the affidavit made in that case in that it predicates the claim of contribution upon the assignment of the judgment. It also appears from the affidavit that, though assigned to the respondents, the judgment was thereafter formally satisfied by the attorneys for plaintiff at the request of some one of the respondents, in order that it might not appear as a lien upon the real estate of the respondents, which they were selling from time to time. This formal satisfaction is alleged to have been made for this purpose only.

The defenses alleged in the counter affidavit of Atkinson in this case are the same as in the former case. The action of the court upon the defense based upon the alleged contract of Atkinson with Webster, Chowen, Crutcher, and Myers, and also upon the plea of the statute of limitations, was the same. The contract sought to be made available herein is the same

as the one alleged in that case, Atkinson claiming that the agreement of release in consideration of the loan of \$3,200 by the Cascade Bank on February 14, 1893, applied to both judgments.

After the proof was heard, the court below ordered execution to issue against Atkinson for \$448.50, or one-fifth of the judgment, with interest; it appearing that Ira Myers had contributed his share of the judgment, and that Wegner was insolvent. From this order Atkinson appeals.

Besides the assignments of error made in the former case, which were therein considered and disposed of, and will not be here again examined, the appellant asks a reversal on two grounds:

(1) That the court erred in granting the motion for the reason that no notice of payment and claim of contribution was filed as provided by Section 1242, Code of Civil Procedure; and

(2) That the court erred in granting the motion for the reason that the judgment had been satisfied of record.

1. The contention is here made that the respondents, having failed to give the notice required in order to avail themselves of the provisions of Section 1242, cannot have the relief sought under the assigned judgment; and this is equivalent to saying that, because the legislature has provided a summary mode by which a surety may enforce reimbursement or contribution under the judgment, the respondents may not, therefore, resort to the remedy invoked here. We understand, however, that the remedy provided by this section is cumulative, and that all the rights and equities existing in favor of the sureties in this regard will be enforced by the courts in proper cases, notwithstanding the existence of the statute providing the summary mode. The surety may proceed to obtain relief by any recognized mode. (*McDaniel v. Lee*, 37 Mo. 206; *Peters v. McWilliams*, 36 Ohio St. 155; *German American Bank v. Fritz*, 68 Wis. 390; 32 N. W. 123.) In the case of *Peters v. McWilliams*, *supra*, in commenting upon a similar statute, the court say: "The effect of

this statute upon the case at bar is to give the plaintiff, who had an existing demand on defendant, a cumulative remedy." It clearly appears in this case that the respondents at the time of payment took an assignment of the judgment, intending to keep it alive in order to enforce contribution from their co-sureties. The question presented by this contention therefore is, may a surety who has paid a judgment against himself and his co-sureties take an assignment of it to himself, and avail himself of it to enforce contribution from his non-paying co-sureties? The right of a surety who has paid the judgment against himself and his principal to keep it alive by having an assignment made to a stranger for his benefit is well settled. (Freeman on Judgments, Sec. 470; Black on Judgments, Sec. 996.) He may also, as against his principal, be subrogated to all the rights of the creditor under the judgment, where such is the intention at the time payment is made. (*German American Bank v. Fritz, supra*; *Eddy v. Traver*, 6 Paige, 521; *Goodyear v. Watson*, 14 Barb. 486; *Flemming v. Beaver*, 2 Rawle, 128, S. C. 19 Am. Dec. 629; Freeman on Judgments, *supra*.) And this may be done whether an assignment be made for the benefit of the surety or not. (*Scribner v. Hickock*, 4 Johns. Ch. 530; *Flemming v. Beaver, supra*, with notes.) The court will, in such case, make the substitution, and grant such relief as may be proper. It is held, also, that a voluntary payment of the judgment by one of several defendants primarily liable thereunder inures to the benefit of all, and extinguishes the judgment. (Freeman on Judgment, Sec. 472.) "Whether one of the several persons against whom a joint judgment has been recovered may pay the judgment, and still keep it on foot by any means or for any purpose, is a question upon which the authorities are very equally divided." (*Id.*) It is held in New York that this cannot be done. (*Harbeck v. Vanderbilt*, 20 N. Y. 395; *Booth v. F. & N. National Bank*, 74 N. Y. 228.) This rule is recognized in Massachusetts, Vermont, North Carolina, Indiana, and Alabama. (*Hammatt v. Wyman*, 9 Mass. 138; *Porter v. Gile*, 44 Vt. 520; *Sherwood*

v. *Collier*, 14 N. C. 380, S. C. 24 Am. Dec. 264; *Preslar v. Stallworth*, 37 Ala. 402; *Klippel v. Shields*, 90 Ind. 81.) But there is an intimation in these cases cited from New York, Indiana, and North Carolina that this is not the rule where there are special circumstances in the case, and the judgment be assigned for the benefit of the paying defendant, or where he occupies the position of a surety, and not that of one who is primarily liable. In *Klippel v. Shields*, *supra*, the court say: "There are cases where a different rule applies; as where the person who pays the debt occupies the position of surety, or some similar relation."

On the other hand, it is held by eminent authority that a surety who pays the judgment for his principal and co-sureties may not only keep the judgment alive as to his principal to enforce reimbursement, but also against his co-sureties for the purposes of contribution; and this may be done either by assignment to a third party for the benefit of the surety paying, or by direct assignment to the surety himself. (*Coffee v. Tevis*, 17 Cal. 239; *Wheeler's Estate*, 1 Md. Ch. 80; *Brown v. White*, 29 N. J. Law, 514; *Scribner v. Hickock*, *supra*; *Lidderdale's Ex'rs v. Robinson's Ex'r*, 12 Wheat. 595; 1 Brandt on Suretyship (2d Ed.) Sec. 279.) The right to subrogation in such cases is made to depend upon the intention of the debtor at the time the payment is made. In *Campbell v. Pope*, 96 Mo. 468, 10 S. W. 187, a judgment had been rendered against several joint defendants, including the city of St. Louis. The judgment was for a tort. Under a clause in its charter the city of St. Louis was only secondarily liable. This judgment was assigned by the plaintiff to a third party, to be kept alive for the benefit of the city, which paid it for the purpose of enforcing contribution. The court supports the right to do this, and, after citing with approval the doctrine of the cases *supra*, say: "We must hold, and do hold, that the payment made by Campbell for the assignment of the judgment was not intended to be a satisfaction of the judgment, and that the assignment thereof to him was made for the purpose of keeping the judgment alive, so that it

might be enforced against the co-defendants, who, under the judgment and charter provision above quoted, were primarily liable for its payment."

We are unable to draw any substantial distinction between the rights of a surety against his principal and his rights as against his co-surety. In each case they are founded upon the implied agreement, growing out of the relation the parties bear to each other, that the one will refund or make good to the other money paid out by the former for the benefit of the latter. If the assignment can be made to a third party, and he can proceed as the agent of the paying defendant to enforce contribution against the co-defendants, there is no sound reason why the same thing cannot be done by an assignment directly to the paying defendant himself, and contribution enforced in his name. To say that one can do through an agent what he cannot do himself seems absurd. In the case of *Coffee v. Tevis*, *supra*, the court brushes aside this fiction, and treats the judgment assigned to the agent as if it had been made directly to the paying defendant. We are of the opinion, not only that the assignment may be made for the benefit of the co-surety, but that it may be made directly to the person who is to benefit by it, and that he may enforce it in his own name. This conclusion seems to be in conformity with the spirit of our statute that the real party in interest shall prosecute the action in his own name. (Section 4, First Division, Comp. St. 1887; Sec. 570, Code Civil Procedure 1895.)

2. It appears from the record, without dispute, that the judgment in this case was formally satisfied by an entry on the judgment record some time after the assignment was made. The respondents were engaged in dealing in real estate, and this satisfaction was entered in order that the lien of the judgment might not appear as a cloud upon their title. The judgment standing open as to them, they were put to the inconvenience of securing releases, or giving bond to clear the title. Crutcher, after taking advice, procured the satisfaction to be entered by counsel for the bank. It was intended

to have it entered as to respondents only. Atkinson had no connection with the matter, nor did he pay any consideration for it. The contention is made that this entry of satisfaction precludes the respondents from obtaining any relief. This contention would be well founded if the satisfaction had been entered generally by plaintiff before the assignment, or, at the request of the defendants, after the assignment, for the purpose of discharging the judgment. (Freeman on Judgments, Sec. 466.) But such was not the case here. The judgment was assigned by the plaintiff to the respondents, to be kept alive by them for the purpose of enforcing contribution, and no entry of satisfaction thereof would inure to the benefit of the non-paying surety unless the intention was thereby to discharge him. It was the intention here that the satisfaction of the judgment should be effective only as to the respondents, and not as to the other defendants. It was not entered in pursuance of any agreement between appellant and respondents. Therefore, as to him, the judgment remained unsatisfied, and, if in force at all against him, it was in force for all purposes. A formal satisfaction of a debt, without payment, where it is intended that discharge shall take effect upon such payment, does not prevent the payee from enforcing the collection of his claim. There is no reason why the same rule should not apply to a judgment. In reaching the conclusions we announce in this case, we are not unmindful of the old distinctions between actions at law and in equity. Under the provisions of our statute (Comp. St. 1887, First Division, Sec. 1; Constitution Art. VIII, Sec. 28; Code of Civil Procedure 1895, Sec. 460) these distinctions as to form have been abolished, and the court, having jurisdiction of the parties, can afford such relief as the facts of the case may justify. (*Faurot v. Gates*, 86 Wis. 569, 57 N. W. 294.) An examination of the authorities cited in the former part of this opinion will show that courts of equity readily granted such relief as is sought herein, and we see no reason why it should be denied here, and the respondents driven to a separate action.

3. A further assignment is made by counsel for appellant

in their argument, though it is not in their brief, that the court below erred in permitting respondent Crutcher to state in his testimony that it was not his intention, at the time he procured satisfaction of the judgment to be entered, to satisfy it as to appellant. This evidence was clearly competent, and the trial court committed no error in admitting it.

Let the order appealed from be affirmed.

Affirmed.

MR. JUSTICE PIGOTT, having been of counsel, took no part in this decision.

IN RE APPLICATION OF PLUME FOR LEAVE TO PROVE EXCEPTIONS.

[No. 1,415.]

[Submitted June 2, 1899. Decided June 6, 1899.]

23	41
23	336
23	41
25	369

*New Trial—Statement on Motion for New Trial—Delay—
Mandamus—Appeal.*

Code Civil Procedure, Section 1157, and Supreme Court Rule 4, Subdivision 14, providing that where the judge refuses to settle a proposed statement to be used on motion for a new trial in accordance with the facts the party aggrieved may apply to the supreme court for leave to prove such statement before a referee, or by deposition, does not apply to a refusal to settle the statement because of unreasonable delay, as the remedy in that case is by mandamus; or, *Semble*: Since the order was made after final judgment, the remedy by appeal might be resorted to.

ON THE application of D. J. Plume for leave to prove exceptions. Application dismissed.

Mr. H. G. Swaney, for petitioner.

PER CURIAM.—Original proceeding. The petitioner makes application to this court for leave to prove before a referee, or by deposition, the facts in relation to a statement of the case on motion for a new trial. The application is made under Section 1157 of the Code of Civil Procedure and Subdivision 14 of Rule IV of this court.

The petition discloses that a judgment of nonsuit was entered against the plaintiff (petitioner) on the 15th day of February, 1898; that thereafter plaintiff duly filed and served a notice of his intention to move for a new trial of the cause; that subsequently he served a draft of his proposed statement of the case, to which defendant proposed amendments; that the plaintiff, not adopting the amendments, delivered the proposed statement and amendments to the clerk for the judge, in accordance with the provisions of Subdivision 3 of Section 1173 of the Code of Civil Procedure; that on the 2d day of May, 1899, the proposed statement, with the amendment, was presented to the judge, and that on May 13, 1899, an order was entered refusing to settle the statement, upon the ground that unreasonable time had elapsed since the statement was presented to the clerk of the court, to the making of which order the plaintiff excepted.

Neither Section 1157 nor the rule of this court above referred to is applicable to this proceeding, for the section and the rule have in contemplation those instances only where the judge, while willing to settle a statement or bill, refuses to allow an exception in accordance with what the party aggrieved claims are the facts. Neither has reference to the action of the judge refusing to settle any bill or statement whatever upon the ground of unreasonable delay in seeking settlement. The petitioner has mistaken his remedy. If the judge or court below abused his or its discretion in making the order by which a settlement was refused, *mandamus* will lie; or, since the order was made after final judgment, the tedious remedy by appeal from that order might, perhaps, be resorted to. It is well established, at least, that *mandamus*, being speedy as well as plain and adequate, is an efficient remedy in such case. (*Careaga v. Fernald*, 66 Cal. 351, 5 Pac. 615; *Brown v. Prewett*, 94 Cal. 502, 29 Pac. 951; *Flagg v. Puterbaugh*, 98 Cal. 134, 32 Pac. 863; *People v. Bitancourt*, 74 Cal. 188, 15 Pac. 744; *People v. Lee*, 14 Cal. 510; *Hicks v. Masten*, 101 Cal. 651, 36 Pac. 130; Hayne on New Trials and App. Sec. 146, Subd. 2, pp. 404-410; *Id.*

Sec. 155, Subds. 1, 2, pp. 450-457.) In *Ayotte v. Thomas*, 20 Mont. 223, 50 Pac. 553, the record showed that the judge below simply declined, without entering any order to that effect, to settle the statement, for the reason that it was not served in time, and the opinion does not disclose that the refusal was made after a final judgment. We do not decide whether in the matter now before us an appeal lies from the order refusing to settle the statement, nor do we think that the *Ayotte* case is an authority either for or against the existence of the right to appeal from such an order as the one attempted to be presented in the proceeding before us. If appeal is a proper remedy, it is not, as is *mandamus*, speedy.

The motion of the petitioner is denied, and the application is dismissed.

Dismissed.

ANDERSON, RESPONDENT, v. CARLSON, APPELLANT.

[No. 1,244.]

[Submitted May 22, 1899. Decided June 12, 1899.]

23	43
23	66
23	120
23	48
25	164
23	43
26	214

Appeal—Briefs—Rules of Supreme Court—Dismissal.

Where the brief of defendant does not contain specifications of errors, nor abstract, nor statement of the case, as required by the Supreme Court, Rule 5, Subdivision 3, the appeal will be dismissed.

Appeal from District Court, Deer Lodge County; Theo. Brantly, Judge.

ACTION by John Anderson against Charles Carlson. Judgment for plaintiff. Defendant appeals. Dismissed.

Mr. J. H. Duffy, for Appellant.

Messrs. Sawyer & Walsh, for Respondent.

PER CURIAM.—The defendant appeals from a judgment against him, and from an order refusing a new trial. The

plaintiff moves a dismissal of the appeals upon the ground that the brief of the defendant does not conform to Subdivision 3 of Rule V of this court. Inspection of the brief discloses neither specification of errors, nor abstract, nor statement of the case. The appeals must therefore, under the authority of *Gibson v. Hubbard*, 22 Mont. 517, 57 Pac. 88, and of the cases therein cited, be dismissed; and it is so ordered.

Dismissed.

MR. CHIEF JUSTICE BRANTLY, being disqualified, took no part in this decision.

STATE EX REL. STATE PUBLISHING CO., RELATOR, v.
SMITH, GOVERNOR, ET AL., RESPONDENTS.

[No. 1,394.]

[Submitted May 10, 1899. Decided June 12, 1899.]

Mandamus—Jurisdiction—State Officers—Approval of Public-Printing Contract.

1. Constitution, Article IV, Section 1, prohibiting any one department of the state government from exercising any of the powers belonging to the other, does not prevent the courts from controlling by mandamus the exercise by the state executive of a purely ministerial duty.
2. Constitution, Article V, Section 30, provides that the state printing shall be done under contract, to be given to the lowest responsible bidder, under such regulations as may be prescribed by law, and that all such contracts shall be subject to the approval of the governor and state treasurer. Political Code, Sections 704-714, provides for the letting of the contract by a State Board of Examiners, of which the governor is made a member; Section 710 providing that all contracts made by the board must be approved by the governor and state treasurer. *Held*, that the duty of such officers to approve a contract let by the board is not ministerial, but involves judicial discretion, and cannot be controlled by mandamus.

APPLICATION by the state, on the relation of the State Publishing Company, against Robert B. Smith, governor, and Timothy E. Collins, treasurer, for *mandamus* to compel them to approve a contract for the state printing claimed to have been awarded to relator by the State Board of Examiners. Dismissed.

STATEMENT OF THE CASE.

This is an application by the State Publishing Company for a writ of mandate to require Robert B. Smith and Timothy E. Collins, as governor and treasurer, respectively, of the State of Montana, to approve a contract for the printing, binding, and distribution of the laws, journals, department reports; and other documents for the State of Montana, which it claims was accorded to it by the State Board of Examiners.

The affidavit alleges that on the 28th day of November, 1898, the State Board of Examiners advertised for more than twenty days, in two daily papers published at the seat of government, for proposals for furnishing and doing all printing and binding and distributing of the laws, journals, reports, and other printing and binding of all books used by any state department or officers, and did invite proposals therefor to be delivered to it on or before 12 o'clock noon of December 20, 1898, and further required each bid to be accompanied by a bond, as prescribed by law; that on December 20, 1898, upon the opening of said bids by the board of examiners, the said board found, and so declared, that the bid of the State Publishing Company was the lowest responsible and best bid for the said work; that the said board did thereupon award to it the contract for doing the said work, by means whereof then and there a contract was made between the State Publishing Company and the State of Montana for the doing of said work, upon the terms and conditions in said advertisement and bid set forth and declared; that the said Robert B. Smith and Timothy E. Collins were at that time, and ever since have been, respectively, the governor and treasurer of the State of Montana, and it then and there became and was the ministerial duty of them, and each of them, to approve the said contract; that although the bid of the relator was \$1,000 less than any other, and the said contract was further reduced to writing, and was, with the bond filed by the State Publishing Company, in fact, and in the judgment of the board of examiners, valid and correct, in substance and form, and although both

the bond and contract were held to be in compliance with the requirements of Section 708 of the Political Code [of Montana, yet the said Robert B. Smith, as governor, and Timothy E. Collins, as treasurer, well knowing that said contract ought to be approved by them, did assume to, and did, in form, disapprove of the same; that they did this with the intent and for the purpose that the contract might be let, and the work done, by a person or corporation not in truth and fact the lowest responsible bidder; that they did not disapprove of the contract because of any defect of form in it or the bond, nor because the said board had not decided that the bid of the State Publishing Company was the lowest responsible bid, nor because the contract had not been awarded to the State Publishing Company, but that their action in withholding their approval was arbitrary, without any reason had or given, and for causes beyond their jurisdiction and authority, which was confined to an inquiry as to the form of the contract, and whether it had been let by the board of examiners in conformity with the law; that meanwhile the said Robert B. Smith, as governor, had ordered the State Publishing Company to do divers and sundry of said printing under said contract, and that the said company, at his request and the request of the board of examiners, had proceeded to do a large amount of said printing, and was proceeding to carry out the contract; that thereafter, and while the said company was engaged in carrying out the contract, the said Robert B. Smith and Timothy E. Collins proceeded to examine the same and, without having or giving any reason, disapproved of the same as aforesaid; that Thomas S. Hogan, secretary of the State of Montana, has caused to be prepared copies of all laws and resolutions, with marginal notes, passed by the Sixth legislative assembly, and also copies of the journals kept, passed, and adopted at such session, with proper indexes of the same, as kept for the public printer, but that he will not deliver to the State Publishing Company or its agent the copies of the laws and resolutions, with proper indexes to the same; that on March 21, 1899, at the office of the Secretary

of State, and during business hours, the State Publishing Company, by its agent, demanded of the said secretary that he deliver to it the said copies, to the end that they might be printed under said contract, but that said secretary refused to so deliver them.

The affidavit further alleges that, for the reasons stated, the State Publishing Company cannot proceed under its contract with profit to itself, as it might otherwise do; that it is entitled to have the contract approved, and was entitled to have it approved, on and before March 21, 1899, because such approval is specially enjoined upon the said governor and treasurer; and that it has no plain, speedy, and adequate remedy, in the ordinary course of law.

Wherefore the writ is demanded, to the end that the said governor and treasurer be required to approve the contract, or to show cause why he should not.

An alternative writ was issued, directed to the respondents, and requiring them to approve the contract as demanded, or to show cause before this court, on the 9th day of May, 1899, why they had not done so.

The respondents moved to quash upon the following grounds:

- (1) That this court has no jurisdiction to issue said writ.
- (2) That the facts stated are not sufficient to constitute a cause of action, or to authorize the issuance of the writ, or to afford any relief to the relator in this proceeding.

Messrs. Sanders & Sanders, for Relator.

Messrs. Carpenter & Carpenter, for Respondents.

MR. CHIEF JUSTICE BRANTLY, after stating the case, delivered the opinion of the court.

The contract referred to in the affidavit was before this court for consideration in *State ex rel. State Publishing Co. v. Hogan*, 22 Mont. 384, 56 Pac. 818, decided on March 31st of this year. It was there held, under Section

30, Article V, of the Constitution, that it is indispensable to the validity of such a contract that it be approved by the governor and state treasurer. The contention is now made by the relator that the duty of approval on the part of the governor and treasurer is purely a ministerial one, and we are asked to enforce the performance of it by *mandamus*. On the other hand, counsel for respondents deny the jurisdiction of this court to exercise any control, through the medium of this writ, or in any other manner, over the executive department of the state government; claiming that it is, under the constitution, an independent, co-ordinate branch of the government, with the functions of which we are forbidden by the constitution to interfere. Our attention is called to the provision of our constitution distributing the powers of the state government into the three distinct departments, and expressly prohibiting any one of them from exercising any of the powers belonging to the other. (Const. Art. IV, Sec. 1.) Similar provisions are found expressed in the constitutions of all the states. The provision is not expressed in the constitution of the United States, but it is held that the various departments of the federal government are as separate and distinct, and as independent of each other in their operations, as are those of the state governments. (*Marbury v. Madison*, 1 Cranch, 137; *Mississippi v. Johnson*, 4 Wall. 475.)

The extent of the jurisdiction of the courts over the executive department of the government by *mandamus* has often been considered. By many courts it is denied altogether. Such courts hold that the executive is responsible, under his official oath, to the people only, and must be left to his own judgment and conscience as to how he shall discharge the duties of his trust. In other jurisdictions it is held that while he cannot be controlled in any way by the process of the courts in the discharge of those duties which are political and executive, involving the exercise of judgment and discretion, yet in the exercise of those powers and duties which are purely ministerial, and which might just as well have been enjoined by law upon some other person, he is as much sub-

ject to the control of the courts as any other officer. There is a great deal of learning in the books on this subject. The following authorities, with the references contained in them, fairly present the opposite views: High on Extra. Leg. Rem. Sec. 118 *et seq.*; Merrill on Mandamus, Secs. 91-97; Wood on Mandamus (3rd Ed.) pp. 86, 87; *Sutherland v. The Governor*, 29 Mich. 320; *People ex rel. Broderick v. Morton*, 156 N. Y. 136, 50 N. E. 791; *State ex rel. Robb v. Stone*, 120 Mo. 428, 25 S. W. 376; *Hovey v. State ex rel. Schruck*, 127 Ind. 588, 27 N. E. 175.) It is not necessary in this case, however, for us to examine these authorities with the purpose of announcing a rule for this jurisdiction. In the case of *Chumaseo v. Potts*, 2 Mont. 242, decided by our territorial supreme court in 1875, it was held that the governor could be compelled by *mandamus* to perform a ministerial act, as where it was made his duty, by statute, to sit as a member of a canvassing board to canvass the vote of the people upon the question of whether the territorial capital should be moved, and he refused to perform the duty. This case was followed by the subsequent case of *Territory ex rel. Tanner v. Potts*, 3 Mont. 364, decided in 1879, where it was held that *mandamus* was the proper remedy to compel the governor to audit and allow a claim of the relator for expenses incurred and for compensation while acting as a messenger, under the appointment of the governor, to bring a fugitive from justice, under a warrant of extradition from the state of Ohio to the territory of Montana. Again, this court, in *State ex rel. Eaves v. Rickards*, 16 Mont. 145, 40 Pac. 210, entertained jurisdiction upon an application for a writ of *mandamus* to compel the State Board of Examiners, *ex officio* also the State Furnishing board, of which the governor was a member, to let the state printing contract to the lowest responsible bidder. Though the writ was denied in this case, yet the application was tried on its merits. It seems that no question of jurisdiction was made, but this court proceeded upon the assumption that it had jurisdiction to try and determine the question presented, though the governor was a member of the board. We shall,

therefore, assume here that the state executive, when acting in a ministerial capacity only, and in matters not involving executive judgment and discretion, may be controlled by this writ.

The constitution (Art. V, Sec. 30) provides that "the printing, and binding, and distribution of the laws, journals, and department reports and other printing and binding * * * shall be performed under contract, to be given to the lowest responsible bidder, * * * under such regulations as may be prescribed by law; * * * and all such contracts shall be subject to the approval of the governor and state treasurer."

The regulations prescribed by law for the letting of the contract are found in the Political Code, Sections 704-714, inclusive. Section 710 provides: "All contracts made by the board must be approved by the governor and the state treasurer."

The relator contends that the provision of the constitution, *supra*, requiring approval by the governor and treasurer, and of the statute passed in pursuance of the constitution, imposes a merely ministerial duty upon these officers, and that their refusal to approve the contract is capricious and arbitrary, and therefore subject to review by this court. The use of the word "must" in the statute is construed by counsel for relator to mean that the obligation merely to approve rests upon them, and that they may not refuse to do so after the board has declared that a certain bid is the lowest responsible bid, and let the contract to the bidder making it. It may be unfortunate that the governor was made a member of this board whose duty it is to let these contracts. It puts him in a position where he can refuse to approve the action of a majority of the board of which he is a member, and thus put his veto upon proceedings in which he takes part. Nevertheless his duty as a member of this board in relation to these contracts is statutory, while his duty in approving or disapproving the action of the board is constitutional, and we are of the opinion that, under the provision of the constitution, it

was designed that he and the treasurer should do more than approve in a ministerial way the action of the board in letting the contract. The expression, "shall be subject to the approval," implies that there may be a disapproval. The word "approve" means "to pronounce good; think or judge well of; admit the propriety or excellence of; be pleased with; commend." (Cent. Dict. tit. "Approve.") The constitution does not define the extent to which they must go in the investigation of the action of the board, nor does it require that they must act together or state any reason for their actions. Yet from the very fact that their approval is indispensable, under the constitution, the conclusion is irresistible that their action is designed to be a check upon the action of the board. This is the implication from the terms used and the rule of construction that every word of the instrument should be rendered operative. *State ex rel. Publishing Co. v. Hogan, supra.* If this be true, in the discharge of their duty they must use their judgment and discretion as to all matters into which the board could or should inquire. This includes not only the pecuniary responsibility of the bidder, but his judgment, skill, ability, capacity and integrity as well. (*State ex rel. Eaves v. Rickards, supra.*) The governor having a general knowledge of the affairs of the state, and presumptively being fitted by his superior qualifications to pass judgment upon the action of the board, it was thought proper by the constitutional convention that he should give the taxpayers the benefit of his judgment and discretion. The treasurer being in a position in which he is presumed to be especially informed as to the condition of the state's finances, it was thought proper to require the exercise of his judgment and discretion also. The ultimate purpose was, by this system of counterchecks, to secure economy and prevent favoritism. It is not for us to say whether the provision is a wise one or not. These officers, acting within the sphere of their constitutional duties, are accountable, under their oaths, to the people only, just as are the individual members of this court, and it is no part of our duties to inquire into their motives in

withholding their approval from the contract let by the board to the relator. If they have acted arbitrarily, if they have chosen to pervert the functions of their high offices to vile, partisan uses, or to the purposes of favoritism, as is suggested by the allegations in the affidavit, we have no power to restore their consciences, and bring them to a sense of their duty. The forum in which they are to be judged is the minds and consciences of the people, whose servants they are, and who alone can hold them responsible for the manner in which they perform their duties.

It boots nothing that the board has let the contract to some other person, as counsel for respondents say. If such be the case, we have nothing to do with such action here. It may have been lawfully or unlawfully done. However this may be, the fact cannot be allowed to influence the judgment of the court in this case.

We are of the opinion that the motion to quash the writ *nisi* is well made. Motion to quash sustained, and the application dismissed.

REYNOLDS, APPELLANT, v. FITZPATRICK ET AL.,
RESPONDENTS.

[No. 1,088.]

[Submitted April 25, 1899. Decided June 12, 1899.]

*Chattel Mortgage—Affidavit of Good Faith—Verbal Mortgage
Between Parties—Conversion—Pleading—Demand.*

1. A statement, signed by all the parties to a chattle mortgage, but the jurat of which does not bear the signature or seal of the officer before whom it was sworn to, is not a sufficient compliance with Civil Code, § 3861, providing that chattle mortgages shall be void unless accompanied by an affidavit of all the parties thereto, or their agents or attorneys in fact, stating that the mortgage was made in good faith, and without any design to hinder, delay, or defraud creditors.
Semble.—In an affidavit of good faith, the several words "hinder," "delay," and "defraud," are essential to the validity of the mortgage.
2. A verbal mortgage of chattels is as binding between the parties thereto as it would be if expressed in writing.

23	52
23	211
23	52
23	171
23	52
23	294
23	52
240	594

3. R. sold personal property to C., and took a mortgage for the purchase price. After C. had paid a part of the purchase price, he, with the consent of R., sold his interest in the property to H., who agreed to pay R. the balance of the price agreed by C. to be paid to R. *Held*, that it was not necessary that R. should have possession to convey title to H.
4. A mortgagee can maintain an action of conversion against one who takes the mortgaged property from his mortgagor after default in the conditions of the mortgage, where the mortgage provides that the mortgagee shall be entitled to possession on default in the conditions of the mortgage.
5. In an action for conversion it appeared that plaintiff sold certain personal property, and took a mortgage to secure payment, and, after the mortgagors had paid a part of the price, they, with the consent of the mortgagee, sold their interest to another, who orally agreed to pay the mortgagee the balance due, and accept the property subject to the terms of the mortgage. The mortgage was void as to creditors of the mortgagor, because not accompanied by an affidavit of good faith. The property was delivered by the mortgagors to the second purchasers, and it was thereafter levied upon by defendants in a suit by creditors of the former. The mortgage, by its terms, provided that the mortgagee should be entitled to the immediate possession of the property if attached by creditors of the mortgagor. *Held*, that it was error to grant defendant a nonsuit on the ground that plaintiff had no title or right to possession which would support conversion.
6. A complaint in an action for conversion, which avers that plaintiff is the owner of the property described, states its value, and the acts of defendant which deprive him thereof, and asks damages, is sufficient, and need not aver that defendant did any wrong.
7. In an action for the conversion, where the taking is wrongful, it is not necessary to allege a demand before the commencement of the action.

Appeal from District Court, Deer Lodge County; Theo. Brantly, Judge.

ACTION by J. B. Reynolds against John Fitzpatrick and another, as sheriff and deputy sheriff. From a judgment in favor of defendants, plaintiff appealed. *Reversed.*

Mr. H. R. Whitehill, for Appellant.

Mr. W. H. Trippet, for Respondents.

MR. JUSTICE HUNT delivered the opinion of the court.

This action is for damages for the conversion of certain personal property by the defendants as sheriff and deputy sheriff of Deer Lodge county.

Plaintiff stated his cause of action in two counts; in the first, after alleging the official capacities of the defendants, he set up that on August 23, 1895, Maddux and Clark executed their promissory note to plaintiff, wherein they promised to pay to him or order \$1,300, with interest, and that on the

same day, to secure the payment of the note, they executed and delivered to plaintiff a chattel mortgage upon certain saloon property. It is alleged that Maddux and Clark did not pay the note, and that on December 2, 1895, the defendants, under and by virtue of certain writs of attachment issued out of a justice's court in actions against Maddux and Clark, attached and took into their possession the personal property described in the chattel mortgage, and that the defendants did not pay or tender to plaintiff the amount of his mortgage debt, with interest, or any part thereof, or deposit the amount thereof with the treasurer of the county, before they attached. Plaintiff pleaded a demand and refusal of payment, and asked judgment for \$1,300, the value of the property.

For a second cause of action, after referring to the facts set out in his first cause, and making them part of the second cause of action, plaintiff alleged that it was provided by the terms of the chattel mortgage referred to that in case of default of payment of the principal or interest, as provided in the promissory note of Maddux and Clark, plaintiff was empowered and authorized to sell all of the goods and chattels described in the said chattel mortgage in the manner prescribed by law; that, by the terms of the promissory note, \$100, with interest, was agreed to be paid by Maddux and Clark to plaintiff on December 1, 1895, but that the said sum was never paid; that it was also expressly provided by the terms of the mortgage that, if default was made in the payment of the principal or interest, as provided in the said note, or if, prior to maturity of the said promissory note, the property described in the said mortgage, or any part thereof, should be attached, seized or levied upon by or at the instance of any creditor or creditors of Maddux and Clark, then, and in such event, or in either of such events, Reynolds, the mortgagee, should have the right to immediate possession of said goods and chattels, and of the whole and every part thereof. The complaint further alleged that on December 2, 1895, the property described in the mortgage was attached, levied upon, and

seized by the defendants, at the instance of Collins & Co., creditors of Maddux and Clark, the mortgagors, and that, by reason of said property having been attached, levied upon, and seized by the defendants as aforesaid, plaintiff became and was at the time of the attachment, levy and seizure entitled to the immediate possession of the property included in the mortgage; that at the time of said levy, attachment and seizure plaintiff was the owner, in possession of, and entitled to the possession of, the said goods and chattels, and that before the commencement of the suit he demanded of defendants possession of said goods and chattels. He then alleged that "by reason of the premises, and the defendants having obtained possession of said goods and chattels in the manner aforesaid, said defendants wrongfully converted and disposed of to their own use the property hereinbefore described, to the damage of plaintiff in the sum of \$1,300." Judgment was asked against defendants, and each of them, for \$1,300, with interest from December 2, 1895.

The defendants, by answer, admitted the seizure and sale of the property, but denied plaintiff's ownership, and denied the facts relating to the alleged conversion, and justified their action under the proceedings had in the justice's court on the ground that the mortgage was void as to the creditors of the mortgagors, because of certain defects in the affidavit of good faith required under the statute.

Plaintiff, by replication, admitted that the proceedings were had in the justice's court under which the writs were issued, whereby the defendants seized the property, but alleged that the judgments were void, and of no effect, because the complaints therein did not state facts sufficient to constitute causes of action, and that the justice had no jurisdiction of the persons of the defendants or of the subject-matter of the actions referred to.

Upon these issues the case went to trial before the court and a jury. Plaintiff offered the chattel mortgage in evidence. Defendants objected upon the grounds that the affidavit required by the statute (Section 3861, Civil Code), was lacking.

An inspection of the mortgage discloses that the purported affidavit reads as follows:

"Geo. M. Clark, S. H. Maddux and J. B. Reynolds, the parties to the foregoing chattel mortgage, being severally duly sworn, each for himself, says that the said chattel mortgage is made in good faith to secure the amount named therein, and without any design to hinder or delay the creditors of the said mortgagors. [Signed]

"S. H. MADDUX,

"GEO. M. CLARK,

"J. B. REYNOLDS.

"Subscribed and sworn to before me this, the 23d day of August, A. D. 1895.

"_____,

"Notary Public in and for Deer Lodge County."

The particular objections of the defendants were that the words "or defraud" were left out of the purported affidavit after the words "hinder or delay," and, furthermore, that there appeared no signature of any officer to the jurat. The plaintiff offered to prove by the notary before whom the acknowledgment was taken that the affidavit was in fact sworn to by the mortgagors, Maddux and Clark, and the mortgagee, Reynolds, but that he omitted to sign his name. The court would not allow this proof to be introduced, and held that under the first cause of action the mortgage was inadmissible, because it was void—First, for lack of an affidavit; and, secondly, because the words "or defraud" were left out; but ruled that the mortgage was admissible under the second cause of action, provided the plaintiff would follow its introduction by showing that he was in possession of the property at the time of the levy.

The mortgage, which in its body is in the common form of statutory chattel mortgages, was made to secure the payment of the promissory note of Maddux and Clark to Reynolds for \$1,300, payable as follows: \$100 was to be paid on October 1, 1895, and \$100 on the first of each and every month thereafter until paid, with interest at the rate of 1 per cent. per month from date until paid. The mortgagors had the right to remain in possession and to use the property until default,

provided, if default occurred in the payment of the principal or interest, or, if, prior to the maturity of the indebtedness, the property should be attached, seized, or levied upon at the instance of any creditor of the mortgagors, the mortgagee should have the right to the immediate possession of the property, and should have the right, at his option, to take and recover such property from any person or persons having or claiming the same.

Plaintiff, Reynolds, testified that Clark and Maddux bought the property from him, and gave him a mortgage to secure a note for \$1,300, payable as heretofore set forth; that they paid \$100 at the end of the first month, and \$100 on November 1st; that about December 2d he asked Clark, who had succeeded Maddux and Clark, for \$50, the amount due on the note on December 1st, not having been paid as required by the agreement; that Clark paid the \$50 to plaintiff, which left a balance of \$50 due and unpaid for December. One Hall met plaintiff about that time, and told him he was talking of buying Clark out. Plaintiff assented to a sale by Clark to Hall, and says he agreed with Hall that Hall might buy the property, and own it when he paid him (Reynolds) \$1,300 at \$100 a month. Hall then went to take possession. On cross-examination Reynolds said that the property had been transferred by Clark to Hall without there ever having been a delivery of possession to him (plaintiff) by Maddux and Clark; that is, that it was transferred directly by Clark to Hall, with Reynolds' consent. He said that he notified the attaching creditors that the chattels seized were his property until he got his pay, and that he had a mortgage on the property, under which he claimed the property until it was paid for; that he referred to the mortgage of Maddux and Clark, and that he had had a like agreement between himself and Maddux.

John A. Hall testified that on the 2d day of December, and before the levy by the defendants, he bought Clark out, and paid him for his interest in the property, took possession and was in the actual possession of the property at the time of the

levy by the defendants; that he had seen the plaintiff a few days before his purchase from Clark, and asked him how much was due on the mortgage from Clark and Maddux to him, and then told plaintiff that he was negotiating with Clark to buy him out. Witness stated that Reynolds told him to go ahead; that he would rather that witness had the property than Clark; that thereafter witness bought Clark out, and agreed with Reynolds to pay him (Reynolds) the balance on the mortgage, and that he then took possession of the property. "I was to pay Reynolds for the property," said Hall, "and when I got it paid for it was mine. It was just the same as though I owned it, only there was a mortgage. Reynolds held the mortgage, and Reynolds could take it away from me at any time I defaulted in the payment. * * * I agreed to pay Mr. Reynolds for the property just on the terms that were in the mortgage. I took their (Clark's and Maddux's) statement for that. I never saw the agreement. I took their statement for the amount that was due on the mortgage. Reynolds told me how much had been paid on the mortgage,—\$250, I believe. There was \$50 lacking. Clark told me that. He said he ought to have paid Reynolds \$100, but he had only paid him \$50. That was on the 1st of December. I sent over to Reynolds' house that day. * * * I wanted to pay him that other \$50, * * * but he was not at home. * * *

* At the time of the attachment Maddux and Clark did not have any interest whatever in this property. When I paid Reynolds for it, I owned it just the same as Clark would have done if he had paid Reynolds. That is all there was of it. I took his place in the mortgage, and bought the stock that he had on hand, and paid him for it, and I agreed to pay Mr. Reynolds the amount that Mr. Clark had agreed to pay him, and it was with that understanding that I took possession of the property." Witness said that he was in possession at the time the sheriff made the levy, and that he told the sheriff at the time that the property was mortgaged, and that he could not attach it, because it belonged to witness. On cross-examination witness said that he claimed to be the sole owner of

the property at the time of the attachment; that he bought the property subject to the mortgage by Maddux and Clark to Reynolds, and was to pay off the mortgage. On redirect examination witness said that he had received a bill of sale from Clark. This bill of sale was introduced in evidence. It recited that Clark had sold and delivered to John A. Hall his right, title and interest in and to the saloon business and property for the sum of \$250. No date appears on the bill of sale.

The foregoing was the principal testimony in the case. Plaintiff then rested, whereupon the defendants moved the court for a nonsuit, because there was no evidence to show that plaintiff was at any time after the execution of the mortgage in the possession or the owner of the property mentioned in the complaint, and that it was not in the possession of the plaintiff at the time it was levied upon by the sheriff, and because there was no evidence to show that the plaintiff was the owner of the property. The court sustained the motion. Judgment was entered for defendants for their costs. Plaintiff appeals from the judgment.

1. The exclusion of the mortgage under plaintiff's first cause of action was correct. As against creditors of the original mortgagors, Clark and Maddux, it was wholly void, because it was not accompanied by any affidavit at all of all the parties thereto, or of their agents or attorneys in fact, that the mortgage was made in good faith to secure the amount named therein, and without any design to hinder, delay, or defraud creditors. (Section 3861, Civil Code.) An affidavit is defined to be "a written declaration under oath, made without notice to the adverse party." (Section 3321, Code of Civil Procedure.) By this definition an affidavit is not only a written declaration, but it must be made under oath. If either requirement is lacking, it is incomplete; and, unless amendment be allowed,—as it may, perhaps, in attachment or other proceedings, where the purpose of the affidavit is not to impart notice,—the defect is generally fatal to the affidavit. The authenticity of the fact that the declaration has been made

under oath is evidenced by the signature of an official authorized to administer oaths to the jurat. Without such authentication, however, the mere signed declaration of the parties is entirely ineffective to constitute a valid affidavit of good faith accompanying the mortgage. (*Alford v. McCormac*, 90 N. C. 151; *Westerfield v. Bried*, 26 N. J. Eq. 357.) The specific provisions of the statute concerning the affidavit of good faith necessary to a chattel mortgage are so plain that it becomes our duty to hold they must be complied with, or the mortgage will be void. The statute and decisions of this court, as well as principle, demand a strict construction of the law which makes a mortgage of personal property *void* against creditors of the mortgagor *unless* it provide that the property remain in the possession of the mortgagor, *and be accompanied by an affidavit that the same is made in good faith, and without any design to hinder, delay, or defraud creditors, and unless it is acknowledged and filed as provided by law.* (*Baker v. Power*, 7 Mont. 326, 16 Pac. 589; *Marcum v. Coleman*, 10 Mont. 73, 24 Pac. 701.)

The mortgage under consideration had no signature or seal to the jurat. It therefore appeared to have no affidavit accompanying it, and, although filed in this condition, such filing could not supply the omission to comply with a material provision of the statute. Creditors going to the files and records of a county, and finding a mortgage like the one under examination, would at once conclude that no oath had been administered to the parties; hence that the mortgage was not such as the law required. On principle, therefore, this mortgage cannot be held valid as against *bona fide* creditors, without ignoring the statute, and it was properly excluded.

In *Hill v. Gilman*, 39 N. H. 88, the court expressed its opinion upon a chattel mortgage which failed to contain a certificate of any oath signed by a justice, as was required by the statute of the state. The mortgage was held invalid against a *bona fide* creditor who attached the property, the court saying:

“It appears to us that to hold this to be a good mortgage

as against the defendant, who stands in the position of a *bona fide* creditor of the mortgagor, would be to evade, if not, indeed, to override, a material provision of the statute. If this requirement can be dispensed with without affecting the validity of the mortgage, then may others also. Suppose the parties should take the oath, but through inadvertence neglect to sign it; or suppose the affidavit should be made upon a paper distinct from the mortgage, and, by some mischance, not be attached to it, and the mortgages, with these defects, be recorded, are we to hold them good against creditors? Other suppositions could be made by which other requirements might be neglected, and, by following the principle out, we might, perhaps, find ourselves back to the common-law mortgage. To carry out the intention of the legislature, we think that all the material requirements of the statute must be complied with; that the certificate of the justice who administered the oath is a matter material to be made and recorded; and that, inasmuch as it was not done in the present instance, the mortgage was invalid as to the creditor."

The affirmance of the ruling of the learned judge excluding the mortgage for the lack of a proper jurat renders it unnecessary to decide whether or not the omission of the words "or defraud" from the affidavit was fatal to the validity of the mortgage. We pass that point, observing, however, that the statute seems to have intended a separate significance to be attached to the several words "hinder," "delay," and "defraud," and that each is required.

2. Advancing next to the ruling whereby defendant's motion for a nonsuit was granted, we must define the attitudes of the parties as disclosed by the evidence, for by doing so the case resolves itself into one of comparative simplicity. The testimony of Reynolds, the plaintiff, is somewhat mixed, impressing us as honest, but given under some apprehension, lest the legal results of his statements in respect to his exact position towards Hall and defendants might deprive him of the value of the property he once sold to Maddux and Clark, and for which he had never been paid. But, when considered

with Hall's statements, the manifest tendency of the evidence was to prove that Reynolds sold the property to Clark and Maddux. They then mortgaged back to Reynolds, agreeing to pay \$100 a month on the 1st of each month until the debt due by them was fully paid. They defaulted in the December payment. Negotiations were then pending between Clark and Hall for a sale by Clark of the Clark and Maddux interest to Hall. Hall, knowing of a mortgage to Reynolds, consulted Reynolds before he would buy. Reynolds agreed to a sale by Clark to Hall. Hall bought, and it is inferable that when Hall took possession by purchase, Reynolds released Clark and Maddux from all further obligation of any kind to him under the mortgage. Clark was then out entirely. He had sold to Hall with the mortgagee's consent, and from the time of his delivery to Hall neither he nor Maddux had any interest in the property. All this occurred before the creditors of Clark and Maddux attached, and in the absence of fraud the sale to Hall will be upheld. Hall, who had bought in good faith, had full possession before the creditors of his vendor, Clark, seized the property. So that, under the circumstances as thus far inquired into, third persons who were creditors of Clark and Maddux could have had no interest in the property at all after the delivery to Hall. Nor can we discover any way by which the sheriff can avoid the strength of plaintiff's case, as we must consider it on a motion for a nonsuit. We regard the contract between Reynolds and Hall as an agreement whereby Hall was to pay Reynolds the same price for the property that Clark and Maddux were to have paid him, less the amount of their payments; and it appears that to secure the payment of the said sum he simply gave a verbal mortgage to Reynolds by which, as owner of the property, he granted a lien upon it to secure the payment of the sum due, upon the same terms, and subject to the same conditions that had formed part of the mortgage contract between Clark and Maddux and Reynolds. He had a right to make such an agreement, and the mortgage will be as binding and effectual between him and Reynolds as though the contract

had been reduced to writing. (Cobbey on Chattel Mortgages § 14.) The unfulfilled terms of the written mortgage were the terms of the new mortgage. It was a novation, whereby all three of the parties entered into the agreement, and the liability of Clark to Reynolds was extinguished upon a promise evidenced by the conduct and agreements of each as a consideration for the promise of the others. (Clark on Contracts, p. 613.)

Possession in Reynolds was not necessary to convey title to Hall. (*Stafford v. Whitcomb*, 8 Allen, 518.) Hall, as mortgagor, was lawfully in possession by the transfer from Clark with the mortgagee's consent. His title was therefore good. The subsequent interference with Hall's possession by the creditors of those who had theretofore sold out to Hall, being unwarranted, gave to Reynolds, as mortgagee, a right to the possession of the property, and to retake the same at once under the provisions of Hall's verbal mortgage, for it was a claim and seizure by persons not parties to the contract between Hall and Reynolds. Reynolds, therefore, could maintain conversion against the defendants. (*Tuttle v. Hardenberg*, 15 Mont. 219, 36 Pac. 1070; *Swenson v. Kleinschmidt*, 10 Mont. 473, 26 Pac. 198; Jones on Chattel Mortgages, § 445.)

We do not believe there was a conditional sale to Hall. There is some testimony to the effect that there was, but the evidence goes to prove a mortgage by writing from Clark and Maddux to Reynolds, and by word from Hall to Reynolds. Suppose, though, the agreement between Reynolds and Hall was one of conditional sale by Reynolds to Hall, still the evidence did not authorize a nonsuit, inasmuch as the creditors of Clark and Maddux had no right to complain, because the sale was honestly made and consummated before their attachments were levied. Our conclusion upon this branch of the case is that the court ought not to have sustained the motion for a nonsuit, and that for error in having granted the motion, the judgment must be reversed.

Defendants' counsel says, in his brief, that there is no

allegation in plaintiff's complaint that "in this attachment and seizure the defendants did any wrong whatever." In conversion plaintiff need go no further in his complaint than to state his title to the property converted, or his right of possession, a description of the property, and a statement of its value, the acts of the defendant which deprived plaintiff of his property, and a demand for judgment for the damages sustained. "The mode of alleging the act of conversion must depend upon the facts of the case. It is not necessary for the plaintiff to allege the details from which his title, or possession, or the conversion by the defendant would follow as their legal effect. Instead of giving a narrative of all the acts performed by the defendant in order to accomplish a conversion, it is permissible for the pleader to allege generally that the defendant converted the property to his own use. A fuller statement of the fact may be preferable, but excessive particularity is not required in the statement of the manner in which a wrong was committed, as the defendant is presumptively better informed of the facts than the adverse party, and the general rule of pleading applies that less particularity is required where the facts lie more in the knowledge of the opposite party than of the party pleading." (Baylies, Code Pleading, p. 153.)

In *Baltimore & Ohio Railroad Co. v. O'Donnell*, 49 Ohio St. 489, 32 N. E. 476, the court said: "The ultimate fact to be pleaded is the conversion, and in actions of that nature a petition with proper allegations of the plaintiff's ownership of the property and of its value, and which avers that the defendant converted it to his own use, states a cause of action."

Tested by these rules, plaintiff's complaint clearly stated a cause of action.

3. Defendants refer to the lack of proof of a demand. A demand was not necessary. (*Eddy v. Kenney*, 5 Mont. 502, 6 Pac. 342.)

Judgment reversed.

Reversed.

MR. CHIEF JUSTICE BRANTLY, being disqualified, took no part in this decision.

SMITH, APPELLANT, v. DENNIFF, RESPONDENT.

[No. 1,118.]

[Submitted May 3, 1899. Decided June 12, 1899.]

Appeal—Briefs—Rules of Supreme Court—Water Right—Appurtenance—Sale Under Mortgage.

1. A brief filed by appellant, which does not, in the statement of the case, make appropriate references to the transcript, showing where therein evidence of witnesses or pleadings are to be found, or which does not specify errors complained of in accordance with Supreme Court Rule 5, is so defective as to justify the court in dismissing the appeal.

Obiter: In the future, the failure of the appellant to meet every requirement of the rules of the Supreme Court touching briefs will be sufficient cause for dismissal of the appeal.

2. The appropriation of a water right from a creek on the public domain for the purpose of irrigating a certain parcel of land, by a person who has no title to said land, but is in rightful possession of said land under a contract with the owner thereof, and the conducting by him of the water so appropriated by means of a ditch to said land, and its continuous use thereon, constitutes such water right and ditch — in the absence of a segregation, change of possession, or diversion of the water by the owner thereof to a use other than that for which it was appropriated, or an intention to do so, and there being no agreement between the owner of the water right and the owner of the land upon which the water right was used by which it might be severed from said land — an incident to the ownership of the land on which it is used, and an appurtenance thereto which none but the owner of said land can convey or sell, and a purchaser at a foreclosure sale of a mortgage of the land, "together with all the water ditches and water rights therewith usually had and enjoyed," made by the owner of the water right, does not acquire any right or title to said water right.

Appeal from District Court, Deer Lodge County; Theo. Brantly, Judge.

ACTION by Matthew Smith against John J. Denniff. From a judgment in favor of defendant, plaintiff appealed. Affirmed.

Mr. G. B. Winston and *Mr. W. H. Trippet*, for Appellant.

Mr. H. R. Whitehill, for Respondent.

MR. JUSTICE PIGOTT delivered the opinion of the court.

Action to quiet title in plaintiff to a water right and ditch, and to enjoin the defendant from diverting water from the latter. Trial was by the court without a jury. From a judg-

23	65
24	21
23	65
25	31
23	65
26	215
26	383
26	480
23	65
33	20

ment entered upon the sustaining of a motion for a nonsuit interposed at the conclusion of the evidence for the plaintiff, he appeals.

1. The brief of the appellant is one that should not have been filed in this court. In the statement of the case the only references made to the transcript are those giving the pages on which the complaint and the substance of a certain judgment roll are transcribed. No reference is made to the transcript for the answer, reply, motion for nonsuit, or judgment. Although several witnesses were examined, the statement fails to show where their testimony may be found. The only error claimed to have been committed is the granting of the nonsuit, and even this is not specified in accordance with the requirements of Rule V. (44 Pac. vii.) of this court, as interpreted in *Babcock v. Caldwell*, 22 Mont. 460, 56 Pac. 1081. We would be justified in dismissing the appeal for the foregoing reasons, but have decided to entertain it in view of the fact that the brief is not as defective as were those in *Anderson v. Carlson*, 23 Mont. 43, 57 Pac. 439, and cases there cited, where the appeals were dismissed for lack of proper briefs. In the future, however, the failure of the appellant to meet every requirement of the rules touching briefs will be sufficient cause for dismissal.

2. In the years 1882 and 1883 a certain ditch was constructed, and through it a water right appropriated out of Cross creek, in the county of Deer Lodge, of which ditch and water right one Oscar Cosins owned an undivided eighth interest. Cosins appropriated the water for the purpose of using it on the N. E. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 17, in township 5 N., of range 10 W., on which he was living, and of which he was in possession under a contract therefor with the Northern Pacific Railroad Company. The water so appropriated was carried upon said land by Cosins, and there used to irrigate the same, it being arid land, and the water being necessary to produce a crop thereon. His brother, one H. C. Cosins, was a joint appropriator, and owned another undivided eighth in the water right and ditch, and was cultiv-

ating a portion of section 16 in the same township. For several years the two brothers used the water to which they were entitled to irrigate the lands of both, but afterwards each brother diverted the water to the use of which he was entitled from a separate ditch, and from that time the water was not used in common, but each brother used his water upon the land for which it had been appropriated. Thereafter Oscar Cosins mortgaged the land occupied by him in section 17, and belonging to the Northern Pacific Railroad Company, "together with all the water ditches and water rights therewith usually had and enjoyed," to the Estes & Connell Mercantile Company, to secure the payment of a debt owing by Cosins to the mortgagee. The plaintiff, as assignee of the mortgage, foreclosed, and at the sheriff's sale purchased all the right, title and interest of Oscar Cosins in and to said land and water right of Oscar Cosins. After the sheriff's deed was executed to the plaintiff, he endeavored to divert the water, but was prevented from so doing by the defendant, who for several years had been, and was then, in possession of and cultivating and occupying the land in section 17 formerly possessed by Oscar Cosins, and then and now owned by the Northern Pacific Railroad Company. It appears that the plaintiff made no claim at the trial of title, possession of, or right of possession to that land. It further appears that the water appropriated by Oscar Cosins was never used by plaintiff, nor has plaintiff ever been in possession or control of the water appropriated by Oscar Cosins. The plaintiff concedes that no right or title of any kind in or to the land described in the sheriff's deed passed to him. The evidence shows that the water right of Oscar Cosins was appurtenant to the land belonging to the Northern Pacific Railroad Company, under which company he held possession. The contention of the plaintiff is that the water right is not an appurtenant to the land for which it was appropriated. But, as already remarked, we think that the proof clearly shows the contrary. The water was appropriated for the express purpose of irrigating a certain parcel of the land. It was actually so used continuously, and was nec-

essary to the cultivation and enjoyment thereof, and was, therefore, an appurtenance. (*Tucker v. Jones*, 8 Mont. 225, 19 Pac. 571; *Sweetland v. Olson*, 11 Mont. 27, 27 Pac. 339; *Beatty v. Murray Placer Mining Co.*, 15 Mont. 314, 39 Pac. 82; *Carman v. Staudaker*, 20 Mont. 364, 51 Pac. 738; *Sloan v. Glancy*, 19 Mont. 70, 47 Pac. 334; Civil Code, § 1078; *Crooker v. Benton*, 93 Cal. 365, 28 Pac. 953.) Title to an appurtenance passes by a conveyance of that to which it is appurtenant. The owner of the land may sell it to one person, reserving, by apt words, the appurtenant water right; or he may sell the water right to one person and the soil itself to another; but, unless there be a clear intention to separate the appurtenant (the incident) from the land (the principal), there can be no separation, and a grant of the land carries with it necessarily the appurtenance. None but the owner of the land may convey or sell the appurtenance. In the case at bar Cosins had no title to the land, and therefore could convey neither land nor appurtenance. Nor is there evidence tending to show any intention on the part of Cosins to mortgage the water right independently of, or as distant from, the land to which he had no title. Whatever the effect of such intention might have been had it existed, and an attempt made to effectuate it, it is evident that the conveyance by mortgage of the land included the water right as a mere appurtenance or incident. It certainly needs no argument beyond this statement to show that Cosins could convey no interest of any description in the land of the Northern Pacific Railroad Company. Such attempted conveyance by mortgage was ineffectual. The land is not part of the public domain. It is land owned by a private person—the railroad company,—and that company and those holding under it own the land with the appurtenances. When there has been no segregation, change of possession, or diversion of the water by the owner to a use other than that for which it was appropriated, nor intention to do so, the water right remains an incident to the ownership of the land, although the water was appropriated by a tenant in possession, and by him made an appurtenance to the land,

there being no agreement between the tenant and the owner by which the water right might be severed by the tenant from the land to which it is appurtenant. The plaintiff, in order to recover, must show title in himself to the water right. He must rely upon the strength of his title, not upon the weakness of that of his adversary. He has failed to prove any title to the water right or any use of the water. By virtue of a contract with the railroad company, Oscar Cosins was in the rightful possession of certain land then and now owned by it. While so in possession he appropriated water, the right to the use of which became appurtenant to the land. There is no proof of any agreement, either express or implied, that the water right might be separated from the land, and held by Cosins as property distinct from that to which it was appurtenant; and, in the absence of such proof, the presumption is that the owner of the land is the owner of the appurtenance. Cosins having no title whatever to the land, did not grant to the plaintiff the appurtenant water right which, without the owner's consent to a severance from the land, remains an inseparable incident thereto. The defendant is in rightful possession of the land formerly occupied by Oscar Cosins, and is using the water thereon. *Smith v. Logan*, 18 Nev. 149, 1 Pac. 678, is cited by plaintiff as supporting his contention. The case is not in point.

The motion for a nonsuit was rightly granted, and the judgment for the defendant was correct, and is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY, being disqualified, took no part in this decision.

CAMERON, APPELLANT, v. WENTWORTH, RESPONDENT.

[No. 1,103.]

[Submitted April 26, 1899. Decided June 22, 1899.]

Trial—Instructions—Jury—Credibility of Witnesses—Replevin.

- | | |
|-----|-----|
| 23 | 70 |
| 125 | 293 |
| 23 | 70 |
| 29 | 424 |
| 23 | 70 |
| 33 | 158 |
| 34 | 28 |
| 34 | 587 |
| 34 | 588 |
| 23 | 70 |
| 35 | 545 |
1. An instruction which authorizes a jury to disregard the entire uncorroborated testimony of a witness, in cases where it is "probable" that he has deliberately and intentionally testified falsely as to some material matter, is bad, as authorizing the jury to judge of the effect of evidence arbitrarily.
- Obiter.*—The power of a jury to form a judgment upon evidence is always confined within the exercise of legal discretion, and in subordination to the rules of evidence.
2. Nor would the instruction be improved by use of the word "palpable," as the power of the jury would thereby be circumscribed by limiting their right to discard the testimony of a witness to those instances only where it is palpable the witness has testified falsely, and is not corroborated by other evidence.
 3. Code of Civil Procedure, Sec. 3390, Subd. 3, which provides "that a witness false in one part of his testimony is to be distrusted in others," requires the jury to distrust only a witness who willfully swears falsely as to material matters.
 4. To maintain an action in claim and delivery, plaintiff must plead and prove his right to the immediate possession of the property at the time of the commencement of the action. Allegations of these essential facts may be by stating the particular facts which entitle plaintiff to immediate possession.

*Appeal from District Court, Lewis and Clarke County;
Henry C. Smith, Judge.*

ACTION by Duncan Cameron against George Wentworth. Verdict and judgment for plaintiff. From an order granting a new trial, plaintiff appeals. Affirmed.

Mr. H. G. McIntyre, for Appellant.

It was contended by the defendant in the court below that said complaints do not state facts sufficient to show that the plaintiff was entitled to the immediate possession of the animals in dispute at the time the suits were instituted. The allegations of the complaint in action No. 3727 are to the effect that the plaintiff is the owner of the animal sued for; that theretofore he had delivered said animal to the defendant Wentworth for racing purposes under an agreement to be

terminated at the option of either party; that without the consent and against the will of the plaintiff said defendant Wentworth started with said animal for St. Paul and at the time of the commencement of the action was enroute with her to that place; that after these acts of Wentworth plaintiff declared said agreement at an end and demanded possession of said animal, but that said defendant still unlawfully withholds and detains the same. The allegations of the complaint in actions numbered 3735 are in effect that plaintiff was the owner and on the 21st day of August, 1896, (the day prior to the commencement of the action) entitled to the possession of the animal sued for; that on said day he had demanded possession of said animal, which was refused.

Conceding the allegations of these complaints to be true, as we must, it is difficult to see wherein they do not state facts sufficient to constitute a cause of action. (*Rutan v. Wolters*, 48 Pac. 385.)

In the first case plaintiff was the owner of the animal, but had parted with the actual possession under an agreement which he was at liberty to terminate at any time; the defendant was asserting ownership in himself; plaintiff terminated the agreement and demanded possession, which defendant refused; and in the second case plaintiff was the owner and entitled to the possession of the animal at the date he made demand therefor, which was the day prior to the filing of his complaint. If sufficient facts are stated to constitute a cause of action, a pleader is not required to make the bold assertion that such cause of action exists in his favor. Nor does good pleading require the allegation of a conclusion arising from the facts stated. (*Gage et al. v. Wayland*, 67 Wis. 566.) But irrespective of this, it is clear that an issue as to the immediate right of possession was raised by the answer, and consequently the court in overruling the objection to the admission of any evidence under said complaints was correct. For even if it be conceded that the complaints were defective in the respect stated (which, however, is not done), such defect, if any, was cured by the allegations of the answer. It

is a familiar rule that a defective complaint may be aided by answer. (*Crowder v. McDonald*, 54 Pac. 43; *Schenck v. Insurance Co.*, 71 Cal. 28; *Wilson v. Sax* (Mont.) 54, Pac. 46; *Shively v. Semi-Tropic, etc. Co.*, 33 Pac. 848; Pomeroy, on Remedial Rights, Sec. 579; *Kreling v. Kreling*, 50 Pac. 546, and cases cited; *Lynch v. Bechtel*, (Mont.) 48, Pac. 1112; *First Nat. Bank v. Schmidt*, (Colo.) 40, Pac. 479; *Hamilton v. Great Falls St. Ry. Co.*, 17 Mont. 434.) The defect, if any, was merely one of form and could have been amended at once if it had been pointed out. That being the case, the complaint is amendable at any stage, even after judgment. (*Hartley v. Preston*, 2 Mont. 415; and see *Hersfield v. Aiken*, 3 Mont. 442), where it is held error to refuse to allow an amendment after verdict and upon application for a new trial. And where a defect in a complaint is first suggested by an objection to the introduction of testimony thereunder, such complaint will be liberally construed so as to uphold it if possible. (*Bank of Glasco v. Marshall*, 47 Pac. 561, and cases cited.) It is not error to refuse to give a particular instruction requested where the charge as a whole covers the matter presented in such instruction. (*Dorrance v. McAlester*, 45 S. W. 141; *Railway Co. v. Morrow*, 45 Pac. 956; *Scoville v. Salt Lake City*, 39 Pac. 481; *Kenyon v. City of Mondovi*, 73 N. W., Rep. 314; *Railroad Co. v. Horst*, 93 U. S. 291; *Great Nor. Ry. Co. v. M'Laughlin*, 70 Fed. 672, and cases cited; *Bonnie et al. v. Earll et al.*, 12 Mont. 240; Thompson, on Trials, § 2423.)

Defendant's principal contention upon his motion for new trial in the court below was that instruction numbered 13 given by the court is erroneous in that the word "probable" is used instead of the word "palpable." Said instruction numbered 13 appears to have been taken from Sackett, on Instructions, p. 32, where, however, the word "palpable" is used instead of the word "probable." It is clear that the use of the word probable instead of palpable was mere inadvertance, probably caused by the mistake of the stenographer when the instructions were dictated to him, and it is incred-

ible that the mere misuse of such word was sufficient to justify the court below in granting a new trial of these actions. By the use of such word, as it stands in the instruction, the jury were simply told that if in their judgment a witness had deliberately and intentionally testified falsely to a material matter they were at liberty to disregard his entire testimony. This being so, no objection of any kind can be urged to the use of the word, for it has been held that an instruction of this kind leaving it to the judgment or opinion of the jury is good. (*People v. Righetti*, 66 Cal. 184; *McFadin v. Catron*, 25 S. W. 506; *Seligman v. Rogers*, 21 S. W. 94.) It is a familiar principle of law that an instruction, even if it be erroneous, will not be sufficient to set aside a verdict unless it is clear and apparent that the jury were misled thereby. As stated by Mr. Thompson: "Thus it is said that instructions faulty or technically erroneous will not work a reversal of the judgment if the jury were not misled, or, if as a whole, the case was fairly presented to them, and especially if their verdict is obviously correct." (Thompson, on Trials, Sec. 2431; *Baltimore & P. R. Co. v. Mackey*, 157 U. S. 72; *Bokien v. Insurance Co.*, 44 Pac. 110; *Pittsburg etc. Ry. Co. v. Welsh*, 40 N. E. 650; *Denver Dry Goods Co. v. Martine*, 55 Pac. 743; *Noyes v. Tootle*, 48 S. W. 1031; *Sams Automatic etc. Co. v. League*, 54 Pac. 642.) And this court has come to the same conclusion in the case of *Hamilton v. Great Falls St. Ry. Co.*, *supra*, where an instruction held to be erroneous by the court was still held not sufficient to justify the granting of a new trial inasmuch as the error complained of was not of a prejudicial nature. To the same effect is the case of *Fitschen v. Thomas*, 9 Mont., pp. 56-57, where it is held that an instruction obviously erroneous was still not sufficient to justify the giving of a new trial inasmuch as the same was not prejudicial or had been cured by other portions of the charge. Again, it is a familiar rule that instructions must be regarded as a whole. On this proposition authorities might be multiplied indefinitely, but the following only are cited: (*Mulligan v. Ry. Co.*, Mont. 47 Pac. 795; *Kennon v.*

Gilmer, 5 Mont. 270; *Hamilton v. Great Falls St. Ry. Co.*, *supra*; *State v. Miller*, 31 Pac. 939; *Lawder v. Henderson*, 14 Pac. 164; *Hurd v. Atkins*, 29 Pac. 528.) Applying this rule to the instructions in this case, and taking them as a whole, it is idle to say that the jury could have been misled by the inadvertent use of the word "probable." Again, it has been decided repeatedly that the mere inadvertent use of a word is not sufficient to set aside a verdict. In the case of *Spencer's Estate*, (Cal.) 31 Pac. 453, it was held that the use of the word "yes" instead of "no" in an instruction was not sufficient to justify the setting aside of a verdict; and in the case of *O' Connor v. Langdon*, 26 Pac. 659, it was held that the inadvertent use of the word "and" in place of "or" in an instruction was not sufficient to justify the setting aside of a verdict. (See also *Terre Haute El. Ry. Co v. Laner*, 52 N. E. 706; *Deig Exr. et al. v. Morehead*, 11 N. E. 462-463.)

Mr. Albert J. Loeb and Mr. C. B. Nolan, for Respondents.

MR. JUSTICE HUNT delivered the opinion of the court.

Plaintiff brought two separate actions in claim and delivery to recover possession of two certain race horses. By consent, the two suits were consolidated for the purposes of trial. Plaintiff recovered a verdict, and judgment was entered in his favor. Defendant Wentworth moved for a new trial, which motion was granted. Plaintiff appeals from the order granting a new trial.

1. One of the grounds upon which the court granted the motion for a new trial was its error in giving the following instruction.

"It is the duty of the jury, in passing upon the credibility of the testimony of several witnesses, to reconcile all the different parts of the testimony, if possible. It is only in cases where it is probable that a witness has deliberately and intentionally testified falsely as to some material matter, and is not corroborated by other evidence, that the jury is warranted in disregarding his entire testimony. Although a witness may

be mistaken as to some of his evidence, it does not follow, as a matter of law, that he has willfully told an untruth, or that the jury would have the right to reject his entire testimony."

Plaintiff contends that the word "probable" was used for "palpable" by mistake, and that the error, if any was not calculated to mislead the jury. This argument is premised upon the assumption that if "palpable" had been used, the instruction would have been a correct statement of the law,—an assumption which respondent seem to have regarded as well taken, and which, for the moment, we will not disturb.

It is undoubtedly the rule that, where a witness has willfully sworn falsely as to any material matter upon the trial, the jury is at liberty to discard his entire testimony, except in so far as it has been corroborated by other credible evidence; but we do not understand that the right to so discard testimony follows, if it be merely *probable* that the witness has willfully sworn falsely. In other words, there must be a belief in the minds of the jury that a witness has actually and knowingly testified falsely as to some material matter before they are at liberty to eliminate his testimony entirely; but a belief that an actual fact exists requires a considerably stronger support than does a belief that it *probably* exists. If a witness has palpably sworn falsely, it is almost self-evident that he has done so. The range of probability is passed over, and it has become more than likely that he has testified falsely, knowingly and intentionally. Therefore, where perjury is palpable, there need be no extended discussion upon which to base a finding that the witness has willfully testified falsely,—the jury may at once act upon the fact so obviously or palpably demonstrated. But to say that a jury can discard testimony, if they conclude that a witness has *probably* perjured himself, is to authorize deliberation, not upon the question of whether he has *willfully* sworn falsely, but upon whether it is *likely* he has done so. So, although the jury might not say they believed the witness did willfully testify falsely, yet, if they could say that it was *probable* or likely that he did so testify, nevertheless the right to discard the entire testimony would exist.

Reasoning along this line carries us to where it is easily seen that a jury would diverge in their consideration of evidence, and too often overlook the necessity for belief in existing facts, amid metaphysical gropings for propabilities, to enable them to ignore testimony. They should not be allowed to do this; for if, in their judgment, probability of perjury alone exists, they cannot legally give that effect to evidence which they may, if, in their judgment, the fact of perjury exists as demonstrable beyond a mere probability that it exists. Therefore, to expressly authorize a jury to act, in discarding testimony, on probability, is wrong. It becomes an authorization to them to judge of the effect of evidence arbitrarily, and weakens, if it does not break down, the force of that other and salutary rule which always confines the power of a jury to form a judgment upon evidence within the exercise of legal discretion, and in subordination to the rules of evidence.

But it is our opinion that the premise which would regard the instruction as sound, if it had read "palpable," instead of "probable," is false and unsound, and that the instruction would still be inherently bad with the word "palpable" imported into it, for the reason that it circumscribes the power of the jury in giving effect to evidence by limiting their right to discard the testimony of a witness to those instances *only* where it is *palpable* the witness has willfully sworn falsely, and is not corroborated by other evidence. No such principle can find favor where the jury are the exclusive judges of the credibility of a witness, and where they are authorized to ignore his testimony, if willfully false, and not corroborated. It may be that a jury, after full consideration of all a witness has testified to, will believe he has perjured himself, yet it may not have been readily observed at all on the trial that the witness willfully swore falsely. Now, under such conditions, the jury have as clear a right to discard his testimony as they would have had if it had been palpable that the witness was willfully falsifying; for the test necessarily is: has the witness willfully sworn falsely as to any material matter? and this is to be ascertained by the jury as a fact, deducible from other

facts or circumstances connected with the trial and before them for consideration. But, in sifting and weighing the evidence, if the fact is found, whether it has manifested itself *palpably*, or whether it has been arrived at by processes of reasoning upon other facts or circumstances, is absolutely immaterial in its effect upon the power of the jury to discard the testimony.

We therefore disapprove of the instruction from the two standpoints discussed. It is essentially erroneous, and the text of Mr. Sackett (page 35), which gives it as the law, finds no support in any language used by the court in *Gottlieb v. Hartman*, 3 Colo. 53, which is cited as authority for its doctrine. It follows that the action of the court below in granting a new trial must be affirmed.

Another ground for granting a new trial was the refusal of the court to give the following instruction requested by defendant: "You are further instructed that a witness who testifies falsely in one part of his testimony is to be distrusted in other parts of his testimony." The instruction offered is substantially the language of Subdivision 3 of Section 3390 of the Code of Civil Procedure, which provides that the jury are to be instructed on all proper occasions "that a witness false in one part of his testimony is to be distrusted in others." Presumably the case was one where the court should have given the instruction requested, or the substance of it, by way of caution to the jury upon effect of evidence. And we can readily understand the aid furnished to a jury by declaring to them the principle meant to be enunciated by the statute, that a witness who has willfully testified falsely as to any material matter must be distrusted as to other parts of his testimony. The statute is not applicable, however, to unintentional errors, or evidence given upon immaterial matters, and without intent to deceive. Its sense is to require the jury to distrust only a witness who willfully swears falsely as to material matters; and we are of opinion that it ought always to be given with the words "willfully" and "material" expressed as qualifications of the rule it declares.

The statute (Sec. 3390, *supra*) came to us from California (Code Civ. Proc. Cal. Sec. 2061), where it has been inter-

puted as applicable only to a witness who is willfully false in a material manner (*People v. Hicks*, 53 Cal. 354; *People v. Soto*, 59 Cal. 367); and, while it has been held in that state that the word "false" is not the equivalent of "mistake," and that the word "willfully" does not change the effect of the instruction as offered (*People v. Sprague*, 53 Cal. 491; *People v. Righetti*, 66 Cal. 184, 4 Pac. 1063, 1185; *White v. Disher*, 67 Cal. 402, 7 Pac. 826), nevertheless we are satisfied that the meaning should be made perfectly clear by avoiding the opportunity for misunderstanding that may reasonably exist by adopting the construction of the supreme court of California announced in the cases heretofore cited and followed in *State v. Kyle*, 14 Wash. 550, 45 Pac. 147, holding that the qualifying words need not be expressed.

As a statute affecting the province of the jury in weighing evidence, it *requires* them to view with distrust the testimony of a witness who willfully swears falsely as to a material matter. They must distrust such a witness, and, under their general power of passing upon the credibility to be attached to each witness, they *may* discard such testimony entirely, except in so far as it is corroborated by other credible evidence. (*People v. Durrant*, 116 Cal. 179, 48 Pac. 75.)

3. It is well settled that, to maintain an action in claim and delivery, plaintiff must plead and prove his right to the immediate possession of the property at the time of the commencement of his suit. (*Bach, Cory & Co. v. Montana Lumber & Produce Co.*, 15 Mont. 345, 39 Pac. 291; *People's Saving Bank v. Jones*, 114 Cal. 422, 46 Pac. 278; *Olson v. Thompson*, 6 Okla. 74, 48 Pac. 184; *Fredericks v. Tracy*, 98 Cal. 658, 33 Pac. 750; Cobbey on Replevin, Sec. 94.) Allegations of these essential facts may be by stating the particular facts which entitle plaintiff to immediate possession; but they must be made. (*Visher v. Smith*, 91 Cal. 260, 27 Pac. 650.) Plaintiff's complaint upon his first cause of action was deficient in these respects, and he should amend before a new trial. His second cause of action was sufficiently well stated.

The order granting a new trial must be affirmed.

Affirmed.

STATE, RESPONDENT, v. HARRISON, APPELLANT.

[No. 1,392.]

[Submitted June 20, 1899. Decided June 26, 1899.]

23	79
29	279
29	280
29	281
23	79
23	537

Criminal Law—Instructions—Presumption of Innocence—Reasonable Doubt.

1. It is error to refuse to charge that accused is presumed innocent until proven guilty a reasonable doubt, though the court gave an instruction properly defining a reasonable doubt.
2. The presumption of innocence has the weight and effect of evidence in the defendant's behalf—introduced by the law in his behalf—and the mere definition of a reasonable doubt does not supply the lack of an instruction upon the presumption of innocence.
3. "A reasonable doubt, within the meaning of the law, is not a mere imaginary or possible doubt, but a substantial doubt, based upon reason and common sense, and induced by the facts and circumstances attending the particular case, and growing out of the testimony. It is such a doubt as will leave one's mind, after a careful examination of all the evidence, in such a condition that he cannot say that he has an abiding conviction, to a moral certainty, of the defendant's guilt as charged." *Held*: a good definition of a reasonable doubt.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

MARTIN HARRISON was convicted of robbery, and from an order denying a new trial he appeals. *Reversed.*

Mr. M. P. Gilchrist, for Appellant.

Mr. C. B. Nolan, Attorney General, for the State.

PER CURIAM.—Defendant was convicted of robbery. His appeal is from an order overruling a motion for a new trial.

Objection is made to our consideration of the instructions marked "Refused," but we think the bill of exceptions discloses what instructions were given or refused, and presents for our consideration the action of the court in refusing the following instruction requested by defendant:

"You are instructed that the law presumes a person innocent until he is proved guilty, and this proof must be of a

nature to satisfy your minds beyond a reasonable doubt of the guilt of the accused. The mere fact that an information has been filed, charging a person with a crime, does not in itself raise a presumption of guilt. A reasonable doubt, within the meaning of the law, is not a mere imaginary or possible doubt, but a substantial doubt, based upon reason and common sense, and induced by the facts and circumstances attending the particular case, and growing out of the testimony. It is such a doubt as will leave one's mind, after a careful examination of all the evidence, in such a condition that he cannot say that he has an abiding conviction, to a moral certainty, of the defendant's guilt as charged. The presumption of innocence has the weight and effect of evidence in the defendant's behalf, and this should continue until it is rebutted by competent evidence which displaces any reasonable doubt you might otherwise have of the defendant's guilt."

No instruction of any kind was given telling the jury that defendant was presumed to be innocent until he was proven guilty beyond a reasonable doubt, although a reasonable doubt was elsewhere defined, as an independent proposition, in the language approved of by this Court in *Territory v. McAndrews*, 3 Mont. 158, and *State v. Gibbs*, 10 Mont. 213, 25 Pac. 289.

But the mere definition of a reasonable doubt did not supply the lack of the instruction requested, by which a knowledge of the presumption of the defendant's innocence was communicated to the jury by the court. The distinction between the presumption of innocence and a reasonable doubt has been drawn with great ability by Justice White, speaking for the court, in *Coffin v. U. S.*, 156 U. S. 432, 15 Sup. Ct. 394. We quote as follows from his learned opinion:

"The fact that the presumption of innocence is recognized as a presumption of law, and is characterized by the civilians as a *presumptio juris*, demonstrates that it is evidence in favor of the accused; for, in all systems of law, legal presumptions are treated as evidence giving rise to resulting proof to the full extent of their legal efficacy. Concluding, then, that the

presumption of innocence is evidence in favor of the accused introduced by the law in his behalf, let us consider what is 'reasonable doubt.' It is of necessity the condition of mind produced by the proof resulting from the evidence in the cause. It is a result of the proof, not the proof itself; whereas the presumption of innocence is one of the instruments of proof, going to bring about the proof, from which reasonable doubt arises; thus, one is a cause, the other an effect. To say that the one is the equivalent of the other is therefore to say that legal evidence can be excluded from the jury, and that such exclusion may be cured by instructing them correctly in regard to the method by which they are required to reach their conclusion upon the proof actually before them; in other words, that the exclusion of an important element of proof can be justified by correctly instructing as to the proof admitted. The evolution of the principle of the presumption of innocence, and its resultant, the doctrine of reasonable doubt, makes more apparent the correctness of these views, and indicates the necessity of enforcing the one, in order that the other may continue to exist. Whilst Rome and the mediaevalists taught that, wherever doubt existed in a criminal case, acquittal must follow, the expounders of the common law, in their devotion to human liberty and individual rights, traced this doctrine of doubt to its true origin,—the presumption of innocence,—and rested it upon this enduring basis. The inevitable tendency to obscure the results of a truth, when the truth itself is forgotten or ignored, admonishes that the protection of so vital and fundamental a principle as the presumption of innocence be not denied, when requested, to any one accused of crime."

The court ought not to have refused the instruction requested, which was correct, although it was not obliged to accept the precise definition of a reasonable doubt contained in it. We believe, however, that the definition of a reasonable doubt was good (Thompson on Trials, Sec. 2483; *People v. Finley*, 38 Mich. 482; *People v. Stubenvoll*, 62 Mich. 329, 28 N. W. 883; *People v. Cox*, 70 Mich. 247, 38 N. W. 235),

and that the whole instruction was correct on both points covered by its language.

For error in refusing the request to instruct upon the presumption of innocence, the defendant must be awarded a new trial.

The order denying defendant's motion for a new trial is reversed.

Reversed and remanded.

COTTER, RESPONDENT, v. GRAND LODGE A. O. U. W.
OF MONTANA, APPELLANT.

[No. 1157.]

[Submitted April 28, 1899. Decided June 26, 1899.]

*Mutual Benefit Associations—Constitution and By-Laws—
Contracts—Ousting Jurisdiction of Courts—Validity—
Construction—Mandamus.*

1. Civil Code 1895, Section 2245, making void provisions of contracts by which the jurisdiction of courts over controversies thereunder is ousted, does not apply to contracts made before its adoption.
2. The common law doctrine, that a provision in an ordinary contract requiring all differences between the parties touching their rights and liabilities thereunder to be submitted to arbiters, whose decision shall be conclusive and final, will not be allowed to bar the litigation of such differences in the courts, is an anomaly, and inconsistent with the right freely to contract, and its operation should not be extended by construction, nor should it ever be invoked to nullify or impair contractual provisions not clearly infected with the supposed evils intended to be cured or prevented.
3. *Semble*: Members of, and those claiming benefits from, mutual benefit societies are bound, in the absence of fraud or palpable error, to seek redress of their grievances in the mode prescribed by the society, wherein vests the sole jurisdiction to right their wrongs, and are precluded from resort to the courts.
4. The laws of a voluntary mutual benefit society required a claimant, whenever any claim under a beneficiary certificate shall be rejected by its grand master and finance committee, before any other proceedings shall be had thereunder, to demand a hearing and offer to submit his claim to its board of arbitration, and if dissatisfied with the conclusions of said board, he must, by appeal, submit his claim to the grand lodge, and if dissatisfied with the action of the grand lodge, he must, by appeal, submit his claim to the supreme lodge, and without such submission and appeal said claimant shall be estopped by virtue thereof from maintaining any suit or action upon such claim.

Held: That such provisions are valid and enforceable so far as they require, as a con-

dition precedent to the bringing of an action at law to recover a money judgment upon a death claim, an exhaustion of the prescribed remedies within the order.

5. The constitution and by-laws of a mutual benefit society are binding on the beneficiary of a deceased member.
 6. The laws of a mutual benefit society provided, that when a death claim "shall be rejected by the grand master workman and finance committee of this grand lodge" the claimant must, before taking any other proceeding, demand a hearing, and submit his claim for the consideration of the board of arbitration. *Held*, that, in view of other provisions of the law referred to in the opinion, the copulative "and" between "grand master workman" and "finance committee" should be read as if it were the disjunctive "or," and that a rejection of a claim by either the grand master workman or by the finance committee is effectual, and that the grand master workman has nothing whatever to do in the matter of approving or disapproving a death claim when the finance committee has rejected it; it is only when the finance committee approves a claim that the power to reject is confided to the grand master workman.
- Semble*: The duty of the finance committee to act, upon the claim, was a ministerial one, the performance of which, if refused or unreasonably delayed, could be compelled by *mandamus*.
7. The finance committee of the state lodge of a mutual benefit society reported, in writing, on a claim submitted to it, that the records showed a prior suspension of the member in question, and there was no report from the subordinate lodge as to his standing since then, and therefore there was nothing before the committee on which it could act. The committee then orally rejected the claim, and the written report of the committee, together with the fact that it had rejected the claim, was communicated to the subordinate lodge which had presented the claim to the state organization. *Held*, a rejection of the claim, within a by-law of the society requiring such claim, on its rejection, to be submitted to arbitration.

Mr. J. W. Kinsley and Mr. Massena Bullard, for Appellants.

Messrs. Howell & Harney, for Respondent.

Courts will not allow contracting parties to oust the jurisdiction of the courts as to any controversies that may arise. (*Randall v. American Fire Ins. Co.*, 10 Mont. 353; *Kumle v. Grand Lodge A. O. U. W.*, 110 Cal. 204, 42 Pac. R. 634; *Daniher v. Grand Lodge A. O. U. W.*, 37 Pac. R. 245; *Insurance Co. v. Morse*, 20 Wall. 451; *Kinney v. Baltimore & Ohio Employees Association*, 15 L. R. A. 142, and cases cited.)

Even those authorities that hold that benefit societies such as the defendant order are in a different category from ordinary mutual life insurance companies, and that provisions in the laws of such societies for the arbitration of claims of members or beneficiaries should first be followed by the person seeking relief before resorting to the courts, nevertheless say that where such provisions seek to make the decisions of

the tribunals of the order final and to preclude the member or beneficiary from subsequently resorting to the courts (as in the present case), they are void as against public policy and may be disregarded. (Niblack on Benefit Societies, Sec. 317, 317a; *Stephenson v. Insurance Co.*, 52 Me. 70; *Roxbury Lodge No. 184, I. O. O. F.*, v. *Hocking*, 38 Atl. R. 693; *Reed v. Washington Ins. Co.*, 138 Mass. 572.)

When plaintiff's claim was submitted to the finance committee, it found that there was nothing before it on which it could act. Plaintiff was told as plainly as possible that she had no standing before the tribunals of defendant order. The answer of defendant virtually asserts the same thing, and yet maintains that she should have sought relief from these tribunals instead of resorting to the civil courts. Such an unjust attitude and procedure on the part of defendant order would in any case justify a member in at once resorting to the courts. (Niblack on Ben. Soc., Sec. 314; *Savage v. Phoenix Ins. Co.*, 12 Mont. 468.)

Granting for the purposes of this brief, that the laws of the defendant order are binding upon plaintiff, yet it will be seen that defendant never gave her any opportunity for such arbitration. The constitution of defendant provides that arbitration may be demanded by a beneficiary after a claim is rejected by the grand master workman and finance committee of the grand lodge.

It will be seen from the entry in the records of defendant order, that plaintiff's claim was never, in fact, rejected, but the finance committee merely refused to act, and this provision of the constitution purports to be one of forfeiture, and must be strictly construed.

"As in all other cases, forfeiture of insurance provided in mutual benefit associations is not favored by the courts. They, in construing the conditions of membership, when a forfeiture is claimed, will preserve, if possible, the equitable rights of the holder of the certificate of membership. (*Modern Woodmen of America v. Jameson*, 48 Kan. 718, 30 Pac. 460; *Elliott v. Grand Lodge*, 47 Pac. 1009; Niblack on Ben. Socs., Sec. 315.)

The same section of defendant's constitution provides that the defendant order, by its grand master workman, may demand this arbitration. No demand for arbitration was ever made by defendant; they simply refused to act, and arbitration was thereby waived. (*Spoeri v. Massachusetts Mut. Life Ins. Co.*, 39 Fed. 752.)

MR. JUSTICE PIGOTT delivered the opinion of the court.

This was an action brought to recover \$2,000, the amount of a beneficiary certificate issued by the defendant to one Daniel P. Cotter, and payable, in the event of his dying while a member in good standing of the defendant, to his daughter, the plaintiff. Trial was had by jury, who found for plaintiff. From an order denying its motion for a new trial, defendant appeals.

Some thirty-seven errors are specified as having been committed by the district court. Of the many questions presented, a detesmination of those relating to one issue will suffice to dispose of the appeal. Questions touching the legal capacity of the defendant to be sued, the admission of Daniel P. Cotter to the Ancient Order of United Workmen, his duty as a member, his alleged suspension and failure to be restored, and the duties and agency of the subordinate lodge to which Cotter belonged, have been raised, but, a decision of them being unnecessary, they are reserved.

The Ancient Order of United Workmen is a voluntary mutual benefit society or association composed entirely of such persons as may become and remain members thereof in compliance with its laws. Its objects, as promulgated by the supreme lodge, are to unite white male persons over 21 and under 45 years of age, regardless of nationality, political preference, or denominational distinctions, who believe in a Supreme Being, into a "fraternal brotherhood" (sic), and to "pledge the members to the payment of a stipulated sum to such beneficiary as a deceased member may have designated while living, under such restrictions and upon such conditions as the laws of the order may prescribe." The supreme lodge

is the governing body of the society, having exclusive jurisdiction of all subjects pertaining to the general welfare of the order, and clothed with appellate jurisdiction, as a final tribunal of review and appeal, of the decisions of the grand lodges. The defendant is the Grand Lodge of the Ancient Order of United Workmen of Montana. It has exclusive original jurisdiction over all lodges of the society in Montana, subject to the constitution and laws of the supreme lodge and the right of appeal. It has power to make rules for conducting its beneficiary system. Its revenues are derived from the fees for the organization of new subordinate lodges, issuing of beneficiary certificates, the sale of lodge supplies, a per capita tax on the membership, and from an assessment of \$1 on each member who has received the Workman degree, imposed whenever the beneficiary fund in the grand lodge treasury is less than \$2,000, or whenever the beneficiary fund would, by the payment of the beneficiary certificates whose liquidation is unavoidably delayed, be reduced below that sum. The members pay the poll taxes and assessments to the subordinate lodges to which they belong, and such lodges forward the money collected to the grand lodge. Upon receipt of the official notice and proof of death of a member in good standing entitled to the benefits of the order, the recorder of the grand lodge shall refer the same to the finance committee, and, when approved by this committee, a warrant shall, with the consent of the grand master workman, be drawn upon the receiver of the grand lodge in favor of the beneficiary of such deceased member, and forwarded to the subordinate lodge to which decedent belonged. The chief officer of the grand lodge is the grand master workman. He must sign all orders drawn upon the grand receiver for such sums as may be voted by the grand lodge, and all warrants authorized by the finance committee between sessions of the grand lodge, if he concur in the approval of the claims for which warrants are authorized. The only method provided through which the grand lodge may pay money is by orders or warrants on its receiver, signed by the grand master

workman, and attested by the grand recorder, under the seal of the grand lodge. The constitution of the defendant grand lodge requires the appointment at each annual session of a board of arbitration to hear and determine all controverted questions which may arise as to the disbursement of its beneficiary fund, and controversies touching its liability for demands against it by those claiming to be beneficiaries of deceased members, and as between those who assert rights as beneficiaries when conflicting claims are set up, "and the decision of a majority of said board shall be final and conclusive, unless reversed by the grand lodge or supreme lodge, it being the purpose and intention of this provision that all these rights shall be determined without recourse to courts of law." The board shall report its action to the grand lodge, which may affirm or reverse the same, and, as a tribunal of review and appeal, make such disposition of the matter as to it may seem proper, subject to an appeal to the supreme lodge. Whenever any claim under a beneficiary certificate issued by the defendant grand lodge "shall be rejected by the grand master workman and finance committee of this grand lodge, before any other proceeding shall be had thereunder, it shall be necessary for the claimant or claimants to demand a hearing, and offer to submit their claim or claims for the consideration of the board of arbitration of this grand lodge, and if, after such offer of submission and hearing thereof, such claimant or claimants are not satisfied with the conclusions of the board of arbitration, such claimant or claimants must, by appeal, submit their claim or claims to the grand lodge for its consideration, and, if such claimant or claimants are not satisfied with the action of this grand lodge, such claimant or claimants must, by appeal, submit their claim or claims to the supreme lodge Ancient Order United Workmen for its consideration and action, as provided by the general laws of this order; and any claimant or claimants seeking to enforce a claim or claims without such submission and appeal shall be estopped, by virtue hereof, from maintaining any suit or action upon such claim."

In December, 1888, Cotter became a member of Butte Lodge No. 1, which was then within the jurisdiction of the grand lodge of Nevada, but which since January 1, 1891, has been under the jurisdiction of the defendant grand lodge. On August 13, 1894, beneficiary certificate No. 764, which is the subject of this action, was issued, countersigned by the master workman of the local lodge in conformity with the laws of the defendant as of December 27, 1888, — the day when the workman degree was conferred on Cotter. This certificate was issued for the purpose of effecting a change in the beneficiary. Cotter died on September 28, 1895. The plaintiff then gave notice and furnished proof of the death of Cotter to the grand recorder through the local lodge. The recorder thereupon presented the notice and proofs to the finance committee of the defendant, which committee made the following report: "In the matter of the death report of D. P. Cotter, there is presented to the committee at this time death report executed by Butte Lodge No. 1, the undertaker and attending physician, but there has been filed in the grand recorder's office up to this time no beneficiary report from Butte Lodge No. 1, containing any reference to D. P. Cotter's standing in the order since the report filed March 7, 1894, which shows D. P. Cotter to have been suspended on assessment No. 2, levied in January, 1894, and there is nothing before this committee on which it can act." It was further shown that the finance committee orally rejected the claim, and advised the grand recorder of such rejection, and that he reported the oral rejection, as well as the written report of the committee, to Butte Lodge No. 1, through which the claim had reached him.

In support of a defense pleaded, the defendant offered to prove that the plaintiff never demanded a hearing before, or submitted or offered to submit her claim to, the board of arbitration of the defendant, although she knew of the action taken by the finance committee. All evidence tending to support such offer was excluded, the defendant excepting. This exception presents the only question which we deem necessary

to consider; for the brief of plaintiff admits that arbitration was not had, and we understood her counsel to concede upon the argument that she had not demanded a hearing, or offered to submit her claim to the board of arbitration.

1. Plaintiff contends that the provisions made by the society and by the defendant order establishing a series of tribunals for the hearing and determination of all controverted questions which may arise as to the liability of the grand lodge of Montana upon death claims under beneficiary certificates issued by it, and declaring the decision of each final and conclusive, unless an appeal be taken to the next higher tribunal, the last being the supreme lodge, which is called a final tribunal of review and appeal, are void,—their expressed purpose being that such claims shall be investigated and finally determined within the society or order without recourse to the courts of law. It is to be observed that the constitution of the defendant, after requiring the claimant to demand a hearing and offer to submit his claim to the tribunals of the order, declares, in effect, that he shall not maintain any suit upon the claim, unless it has first been submitted and appealed.

Much contrariety of opinion is revealed by the adjudications with respect to the question of whether the laws of mutual benefit societies of the character of the Ancient Order of United Workmen which establish tribunals whose decisions are declared to be final and conclusive may be permitted to effect the result sought to be attained,—the prevention of resort to the courts by a member or one claiming to be a beneficiary. The common-law doctrine that a provision in an ordinary contract requiring all differences between the parties touching their rights and liabilities thereunder to be submitted to arbiters, whose decision or award shall be conclusive and final, will not be allowed to bar the litigation of such differences in the courts of the land, is an anomaly, and inconsistent with the right freely to contract; and, if it were not so firmly and well-nigh universally established, we apprehend that it would be over-turned, as resting upon no solid foundation of reason. Its operation should not be extended by

construction, nor should it ever be invoked to nullify or impair contractual provisions not clearly infected with the supposed evils intended to be cured or prevented. (See *President, etc. of Delaware & H. Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 258.) The doctrine is, however, recognized and approved by the decisions of this court (*Wortman v. Montana Central Railway Co.*, 22 Mont. 266, 56 Pac. 316, and the citations therein), and also by section 2245 of the Civil Code of 1895, which, having been enacted since the constitution and laws of the defendant were promulgated and adopted, and after Cotter became a member of the defendant, has no pertinency to this case. On principle, there seems to be no good reason why the members of a purely mutual and semicharitable benefit society may not agree and contract with each other by laws of their own making that future differences and controversies, arising out of their relation to each other and to the society, shall be finally determined by the tribunals created and selected by themselves. We are inclined to think the better reasoning is with those courts which, while recognizing and following the common-law rule where ordinary contracts are involved, nevertheless hold that the members of, and those claiming benefits from, the society are bound, in the absence of fraud or palpable error, to seek redress of their grievances in the mode prescribed by the society, wherein vests the sole jurisdiction to right their wrongs, and that they are precluded from resort to the courts. (*Robinson v. Templar Lodge*, 117 Cal. 370, 49 Pac. 170; *Canfield v. Great Camp, etc.*, 87 Mich. 626, 49 N. W. 875, and cases there referred to; *Fillmore v. Great Camp, etc.*, 103 Mich. 437, 61 N. W. 785; *Id.*, 109 Mich. 13, 66 N. W. 675.) But it is not now necessary to decide whether the provision of the defendant's constitution attempting to prevent the maintenance of an action at law upon a beneficiary certificate is enforceable or not. Even though such provision be void, the requirement that the claimant shall seek and exhaust his remedies within the order before he may litigate his rights in the courts is valid, and must be complied with. We feel

no hesitancy in declaring that the provisions are reasonable and valid in so far, at least, as they demand a resort to the several tribunals of the order as a condition precedent to maintaining an action at law to recover a money judgment upon a death claim, and such is our opinion without reference to the clause that "any claimant * * * seeking to enforce a claim * * * without such submission and appeal shall be estopped, by virtue hereof, from maintaining any suit or action upon such claim"; for the claimant would still be required, by virtue of the other provisions, to pursue the course and exhaust the remedies prescribed by the order as a prerequisite to the right, if any there be, of resort to the courts. Similar provisions in the laws of like societies have been frequently the subjects of judicial inquiry. The view that they are inoperative has been expressed in but few cases, of which *Daniher v. Grand Lodge, A. O. U. W.*, 10 Utah 110, 37 Pac. 245, is a type. An extended and critical examination of the reported adjudications justifies us in making the assertion that the substantial unanimity of opinion, based upon correct principles, upholds such provisions as valid and enforceable so far as they require, as a condition precedent to the bringing of an action, an exhaustion of the prescribed remedies within the order. Out of a multitude of decisions supporting this view, we cite: *Robinson v. Templar Lodge, supra*; *Supreme Council v. Forsinger*, 125 Ind. 52, 25 N. E. 129; *Jeane v. Grand Lodge*, 86 Me. 434, 30 Atl. 70; *Supreme Lodge v. Raymond*, 57 Kan. 647, 47 Pac. 533; *Smith v. Ocean Castle*, 59 N. J. Law 198, 33 Atl. 849; *Robinson v. Irish-American Ben. Society*, 67 Cal. 135, 7 Pac. 435; *Poultney v. Bachman*, 31 Hun. 49; *Harrington v. Workingmen's Ben. Association*, 70 Ga. 340; *Wood v. What Cheer Lodge (R. I.)* 35 Atl. 1045; *Levy v. Order of Iron Hall*, 67 N. H. 593, 38 Atl. 18; *Oliver v. Hopkins*, 144 Mass. 175, 10 N. E. 776; *McAlees v. Supreme Sitting Order of the Iron Hall (Pa. Sup.)* 13 Atl. 755; *Grant v. Langstaff*, 52 Ill. App. 128.

2. The suggestion that the constitution and laws of the defendant order may not be binding upon the plaintiff as the

beneficiary of a deceased member is without merit. Whatever right she may have arises from, and depends solely upon, the voluntary act of her father in becoming and remaining a member of the defendant order, and she is as much bound as was he. (*Canfield v. Great Camp, etc. supra.*)

3. The plaintiff insists that her claim was not rejected by the grand master workman and the finance committee of the defendant, and that a rejection by each is, under the laws of the defendant, a prerequisite to the existence of a right in her to demand a hearing before, and submit her claim to, the board of arbitration, and that therefore she was under no obligation to demand a hearing, or submit her claim prior to bringing the present action. The provision referred to has already been stated. It is that, whenever a death claim "shall be rejected by the grand master workman and finance committee of this grand lodge," the claimant must, before taking any other proceeding, demand a hearing, and offer to submit his claim for the consideration of the board of arbitration. The language, literally interpreted, means that an appeal does not lie, unless both the grand master workman and the finance committee reject the claim. No difficulty is experienced in reaching the conclusion that a rejection by either the grand master workman or the finance committee is sufficient to require the claimant to seek relief from the board of arbitration. The copulative "and" between "grand master workman" and "finance committee" should be read as if it were the disjunctive "or." It is to be noted that all warrants and orders for the payment of money by the grand lodge must be signed by the grand master workman. When the grand lodge itself orders a warrant drawn, the grand master has but one duty to perform with respect to it, to wit: the signing of the warrant. He has no discretion in the matter. He is without authority to approve or disapprove. When, however, the finance committee approves claims, and authorizes warrants between sessions of the grand lodge, their action is subject to the approval or disapproval of the grand master workman; for without his consent to the allowance by

the finance committee, disclosed by his signing the warrant, the action of the committee is without effect. If he approves the allowance, he signs the warrant for its payment. If he disapproves, his duty is performed when he omits to sign. His approval, as well as that of the committee, is, in the absence of an appeal, required for the valid allowance of a claim. A disapproval by either is a rejection. The finance committee may approve a claim which the grand master workman disapproves, or the finance committee, acting independently of the grand master workman, may refuse to allow a claim,—in either case the rejection is effectual. The grand master workman has nothing whatever to do in the matter of approving or disapproving when the finance committee has rejected; in such case his attempted rejection adds nothing to the effect already produced by the action of the committee. In short, neither the grand master workman nor the finance committee alone can allow a claim, but either may reject, although the other may favor payment. According to the theory of the plaintiff, an appeal does not lie when the finance committee approves, and the grand master workman rejects a claim. Her theory is also that an appeal does not lie, unless the grand master workman performs the vain and useless act of disapproving the claim already rejected by the finance committee. He has no duty whatever to perform where the finance committee rejects a claim. It is only when the committee approves that the power to reject is confided to him.

The duty of the finance committee was to act upon the claim. This duty was ministerial, the performance of which, if refused or unreasonably delayed, could doubtless be compelled by *mandamus*, to the end that the rights and privileges of both the plaintiff and defendant might be preserved and enforced in conformity with the laws of the society. Under such circumstances, in view of the provisions in respect of the obligation to submit to arbitration, *mandamus* would seem to be the only remedy at law available to the plaintiff, unless, indeed, the refusal or delay were tainted with bad faith, of which the record presents no evidence. But discussion or de-

cision of this question is unnecessary, since there was evidence tending to show a rejection. The written report of the committee may possibly not have been a complete rejection. It was, however, at least a qualified rejection, or a failure or refusal to approve at the time the report was made for the reason therein stated, which reason prevented favorable action on the claim. In addition to the written report, the committee orally rejected the claim. Such report and rejection were communicated to Butte Lodge No. 1, by which, on plaintiff's behalf, the notice and proof of death had been sent to the defendant, and the inference is that she was duly advised of the disallowance.

In excluding the offer to show that plaintiff never demanded a hearing or offered to submit her claim to the board of arbitration, the court erred to the prejudice of the defendant.

The order denying a new trial is therefore reversed, and the cause is remanded.

Reversed and Remanded.

CITY OF BUTTE, RESPONDENT, v. CALL, APPELLANT.

[No 1,410.]

[Submitted June 27, 1899. Decided July 3, 1899.]

Criminal Law—Appeal—Notice of Appeal—Record—Dismissal of Appeal.

The Appellate Court is without jurisdiction to consider an appeal, where the record contains no copy of the notice of appeal, as prescribed by Penal Code, Sec. 2281.

Appeal from District Court, Silver Bow County; William Clancy, Judge

ACTION by the City of Butte against Frank Call. From a judgment for plaintiff, defendant appeals. Dismissed.

Mr. Chas. O' Donnell, for Appellant.

PER CURIAM.—The record in this case shows that the defendant was tried in the police court of the city of Butte, Silver Bow county, on a charge of violating Section 16 of Ordinance 471 of said city of Butte, entitled, "An ordinance providing for the payment of licenses to the city of Butte, and repealing Ordinances Nos. 93, 342, 549, 373, 404 and 453." He was adjudged guilty as charged, and sentenced to pay a fine. From this judgment he appealed to the District Court in and for said county, and upon another trial had therein, on May 16, 1898, he was again found guilty, and judgment for a fine entered against him. The record, however, contains no copy of the notice of appeal given, as provided by Section 2281 of the Penal Code. This Court is therefore without jurisdiction to review any question presented therein. The appeal is therefore dismissed.

Dismissed.

23	95
e34	473
L34	476
23	95
40	30

BRAMLETT, ET AL., RESPONDENTS, v. FLICK, ET AL.,
APPELLANTS.

[No. 1081.]

[Submitted April 12, 1899. Decided July 3, 1899.]

*Mining Claims — Location — Ouster — Evidence — Filing of
Record — Construction of Notice.*

1. A notice of location of a mining claim, which, by reference to natural objects and monuments erected by the locator, contains directions which, taken in connection with such objects, would enable a person of ordinary intelligence to find the claim and trace its boundaries, is sufficient.

Obiter.—Courts always construe these notices liberally.

2. Whether or not a claim could be ascertained from such notice and the proof in regard to the surroundings is for the jury.
3. In an action to determine adverse claims to a mining claim, a notice of location which described a claim as being situated in a certain county, a certain distance from another claim, and defined by courses marked by substantial monuments, readily identified by marks thereon, taken in connection with evidence that the locator discovered gold-bearing quartz, and made a monument at the place of discovery, upon which he posted his notice of claim, shows prima facie ownership of such claim.
4. An entry upon the land of another under assertion of title is an ouster; intention guides the entry, and fixes its character.
5. Where one enters upon the mining claim of another under claim of title thereto, and

- mines thereon, and warns such other not to mine thereon, such conduct amounts to an ouster from the territory of the latter claimed by the former.
6. Where one mining claim encroaches upon another, it is not error to permit the engineer, who has made a plat thereof, to point out the exterior boundaries of the encroaching claim, as it tends to enlighten the jury as to the controversy.
 7. A question as to whether a practical surveyor, familiar with the methods of locating claims, and familiar with surveys in mountainous countries and with the neighborhood, could take the description in a notice of location of a claim, and, starting at the point of discovery, find the claim described therein, is incompetent, as calling for an opinion.
 8. In an action to determine the boundaries of conflicting mining claims, evidence as to whether or not a surveyor found the boundaries of a claim without assistance, whether the blazing upon posts appeared to be old or new, and whether he could readily find the blazes on the trees along the boundaries, and whether they could be traced from one to another, relates to matters of fact, and is not open to the objection of being opinion evidence.
 9. Under Comp. St., div. 5, § 1477, which provides that the discoverer of a mining claim shall have 20 days in which to complete the location and make the necessary record, a discoverer who posted in plain view a notice of location, and "claim of 1,500 feet on this lead, with twenty days for prospecting," if he made it in good faith, and with an intention to complete his location within the prescribed 20 days, thereby acquired a right to all the ground along the lead legitimately covered by his notice; and one locating thereon subsequently to such notice, and prior to the expiration of the 20 days, does not acquire a superior title, though he filed his statement and record within 20 days, and the former did not.
 10. A notice, posted by the locator of a claim, that he claims 1,500 feet on a lode, will be construed to limit his claim to 750 feet along the lode on either side of the point of discovery.
 11. The fact that a locator, after posting his notice, included within his boundaries ground not legitimately covered by his notice, if this was done in good faith as the result of ignorance or inadvertence merely, would not invalidate his claim, in so far as it includes what was legitimately covered by the notice.

Appeal from District Court, Flathead County; Charles W. Pomeroy, Judge.

ACTION by J. H. Bramlett and others against John J. Flick and another. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

Mr. G. B. Winston and Mr. C. H. Foot, for Appellants.

Messrs. Sanford & Grubb, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

In this action the plaintiffs seek to recover possession from defendants of a portion of the surface ground of the Blacktail lode claim, situate in Missoula (now Flathead) county. The complaint alleges ownership and right of possession in plaintiff.

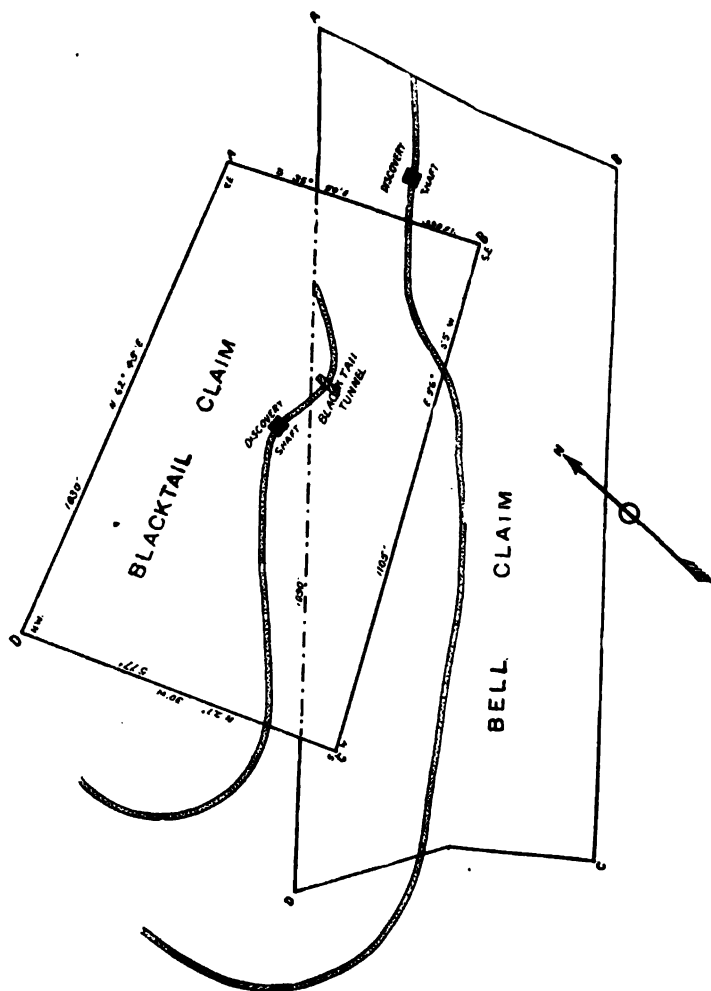
iffs of 1,500 feet along the lode, and 300 feet on either side from the middle or center thereof, under and by virtue of a discovery and location thereof on July 12, 1892, and a compliance with the laws of the United States and the state of Montana, by proper record of their declaratory statement. It is then alleged that on or about August 20, 1894, the defendants entered upon a portion of the claim, ousted plaintiffs therefrom, and now unlawfully withhold the same from them, to their damage in the sum of \$200.

The defendants, after denying the allegations in the complaint, set up title, right of possession, and possession, in themselves, under a location called the "Bell Lode Claim," alleged to have been made by them prior to that of plaintiffs'. They allege the facts of their discovery, location, and a compliance with the law necessary to a valid claim. They further allege that the boundaries of the Bell lode claim conflict with those of the Blacktail lode claim, particularly describing the conflicting area by metes and bounds, and claim that they are lawfully in possession of this area under their prior location. The complaint does not describe this area, but in the trial court proof was introduced by the plaintiffs identifying it, and the case was treated by both parties as if the complaint contained a proper description. No question is made here on this point. We shall therefore assume that the complaint is sufficient in this regard, and so treat it.

The trial in the court below resulted in a verdict and judgment for the plaintiffs. The case comes here, on appeal from the judgment and an order overruling defendants' motion for a new trial.

The plaintiffs first produced evidence of what plaintiff Bramlett, who made the location of the Blacktail claim, did at the time of the location, in the way of making a discovery, posting his notice, and marking the boundaries of the claim. His evidence was supplemented by that of A. L. Jaqueth, a mining engineer, who had made a survey of both claims a few days before the hearing. As an exhibit to his statement, there was introduced in evidence a plat or diagram made by

him from this survey, showing the relative positions of both claims, the courses and extent of their boundary lines, and the area in conflict. For illustration and for convenience for reference, this diagram is inserted here:



Thereupon, over the objection of the defendants, the court admitted in evidence a copy of the notice of location of the Blacktail claim, filed for record on August 1, 1892. The

ground of the objection was that it is incompetent, immaterial, and irrelevant, in that it contains no such description of the claim, with reference to natural objects or permanent monuments, as will identify the claim, and that the evidence up to that point showed that the claim is not correctly described in the notice. The notice, after stating that the plaintiffs' claim extends 750 feet easterly and westerly from the discovery shaft upon the lode, and 300 feet on either side of the center or middle thereof, proceeds: "This lode is situated in an unorganized mining district in the county of Missoula and state of Montana, on a branch of Foundation Fisher creek, about six miles N. W. of where Thompson Falls crosses same. The adjoining claims are none, the Golden Eagle being about one mile S. E. from the Blacktail. The exterior boundaries of this location are distinctly marked by posts or monuments at each corner of the claim, so that its boundaries can be readily traced, viz: Beginning at N. E. corner post, marked 'A,' and running from thence six hundred feet in a southerly direction to S. E. corner post, marked 'B'; from thence fifteen hundred feet in a westerly direction to S. W. corner post, marked 'C'; from thence six hundred feet in a northerly direction to N. W. corner post, marked 'D'; and from thence fifteen hundred feet, in an easterly direction, back to post 'A,' place of beginning."

The evidence of plaintiff Bramlett tended to show that he went upon the ground on July 12, 1892, and made a discovery at the point marked "Discovery Shaft" on the diagram, of quartz in place, containing free gold; that this was from 9 to 10 o'clock in the forenoon; that he proceeded at once to make the location by piling up a monument of stone at the point of discovery, and putting up a substantial copy of the recorded notice there; that he then staked both ways 750 feet; that he put up the northeast corner first, and then the others, going from this point around the claim, and back to the place of beginning; that at the northeast and northwest corners he cut off trees four or five feet from the ground, and squared the stumps; that at the other two corners he blazed standing

trees on four sides; that he also put up a center end stake at the east end of the claim; that the corners were marked "A," "B," "C," and "D," in order, preceded by the name and date, "Blacktail, July 12, 1892"; that the east end center stake was a tree, blazed and marked; that he was engaged at the location until about noon, and that he saw no signs of prospecting there; that the ground covered by the claim is rough and mountainous, with cliffs towards the northwest, sloping rapidly down towards West Fisher creek on the north and northeast, and covered partly with undergrowth and down timber; that he had to guess at the courses, and had no means of measuring the distances, other than by stepping from point to point; that the Golden Eagle claim was located by himself on June 27, 1892; that this claim is on Bramlett creek, which is about a mile southeast of the Blacktail claim; that his camp where he stayed during his prospecting was on Bramlett creek; that there is no such stream as Foundation Fisher creek, but that Foundation is a flat down below on the main or West Fisher creek, where the Thompson Falls trail crosses West Fisher creek, and from which the trail up to Bramlett creek and the Blacktail country leads; that the Blacktail claim is in fact located on West Fisher creek, and not on a branch of it; that at the time the location was made he supposed it was on a branch of the West Fisher, but that it is upon the main stream; that he afterwards, at various times, saw all the posts put up by him upon the claim and that they all remained there until about the beginning of this action, except the northwest corner, which he discovered, in the spring of 1896, had disappeared, and that he restored it at that time by setting up as near the same place as possible a post similar to the original one, and marking it, "Post Restored"; and that the plat introduced in evidence is a fairly correct representation of the claims, and their relative positions.

This witness became somewhat confused in giving the directions from each other of the boundary posts upon the claim, and the course he went from the place of beginning at the time he made the location. In the notice it is stated that post

B is in a southerly direction from post A. In his testimony he states he went from post A to B in an easterly direction. From the plat it appears that he went in a direction S., $35^{\circ} 50'$ E. Again, the southwest corner is given in the notice as westerly from post B at the southeast corner, while he states that he went in a southerly direction from post B to this corner. The plat shows that this direction is S., $56^{\circ} 55'$ W. In another part of his testimony he also states that the Black-tail claim is southwest from the Golden Eagle about one mile, thus placing it a mile or more from the locality given it in the notice. It further appears from the plat and the testimony of Jaqueth that the distances from post to post mentioned in the notice are materially greater than these distances as actually measured. Jaqueth states that there was some difficulty in finding the claim at the time of the survey, and that the plaintiffs were compelled to call to their assistance one McGovern, who knew the country well, before they could locate it. Jaqueth further testifies that at the time the survey was made the country was covered with a deep snow, and that it was necessary for the surveying party, in order to find the corners, to dig down into the snow. It was upon the ground of these inconsistencies and discrepancies in the proof offered in support of the notice, as preliminary to offering it in evidence, that the objection to its admission was predicated. At first glance, the inconsistencies do seem glaring and irreconcilable, but upon closer view they in large measure disappear; at least, they so far disappear, or are explained away by other parts of Bramlett's statements, that we think the court was right in overruling the objection and allowing the notice to go to the jury. The reference in the notice to Thompson Falls crossing and Foundation Fisher creek certainly gives no aid in identifying the claim, in view of Bramlett's statement that no such place exists. But this reference may be omitted entirely, and still enough be left in the notice, by way of reference to the other objects, to go to a jury, under the evidence applying the other objects mentioned to the locality surrounding the claim, and identifying the monuments upon the claim

itself. (Lindley on Mines, Sec. 383; *Flavin v. Mattingly*, 8 Mont. 242, 19 Pac. 384; *Gamer v. Glenn*, 8 Mont. 371, 20 Pac. 654; *O'Donnell v. Glenn*, 8 Mont. 248, 19 Pac. 302; *Hoffman v. Beecher*, 12 Mont. 489; 31 Pac. 92; *Upton v. Larkin*, 7 Mont. 449, 17 Pac. 728; *Russell v. Chumaseero*, 4 Mont. 309, 1 Pac. 713; *Brady v. Husby*, 21 Nev. 453, 33 Pac. 801.) "It is not for the court to say, by merely looking at a record or declaratory statement, what are or what are not permanent objects or monuments. That is a matter of proof. A stake or a stone of the proper size, and properly marked, may be a permanent monument. A declaratory statement or record thereof, with a reference to permanent stakes or monuments, which did not exist as a fact on the ground, would not be good, while a defective description in the record or declaratory statement might be cured if the stakes or monuments on the ground identified the claim." (*Russell v. Chumaseero*, *supra*.) The reference to the Golden Eagle claim is definite enough to allow the notice to be submitted to the jury. True, Bramlett places it in a direction different from the one stated in the notice; but subsequently this error is corrected by a statement that this latter claim is on Bramlett creek, and that the creek is about a mile southeast from the Blacktail claim. This statement is further aided by his testimony in another part of it, where he states that his camp was on Bramlett creek. This camp is more than once referred to by him as "my camp on Bramlett creek," and appears to have been a point on the creek at which the prospectors in that vicinity casually met from time to time in passing to and from the mountains. The fact that the Golden Eagle claim had been located by Bramlett himself on the 17th of the previous month did not necessarily raise a presumption that it was not well known at the time of the location of the Blacktail. In the absence of proof to the contrary, the presumption attached that it was well known. (*Hammer v. Garfield Mining & Milling Co.*, 130 U. S. 291, 9 Sup. Ct. 548; *Id.*, 6 Mont. 53, 8 Pac. 153; *Book v. Justice Mining Co.*, 58 Fed. 106.) It is fair to suppose that such was the case, since it appears from the proof

that it was among the first locations made in that part of the country, and that the miners going up into that section passed up and down Bramlett creek near where it was located. At any rate, the question was for the jury. (*Dillon v. Bayliss*, 11 Mont. 171, 27 Pac. 725; *Metcalfe v. Prescott*, 10 Mont. 283; 25 Pac. 1037, and the other authorities cited.) Even upon the presumption that this claim was not well known, still there is reference to marked stakes and trees upon the Black-tail claim itself, which the jury, under the authority of the cases cited, and under the proof so far given, might find to be permanent monuments. The discrepancies between the actual courses and distances and those stated in the notice do not necessarily vitiate the notice. "A mistake in the certificate as to the direction and course, such as 'northerly' instead of 'northeasterly,' the description being aided by the monuments on the ground is of no moment." (Lindley on Mines, § 381; *Sanders v. Noble*, 22 Mont. 110, 55 Pac. 1047; *Book v. Justice Mining Co.*, *supra*.) It is sufficient if the description in the notice "contains directions which, taken in connection with such boundaries, will enable a person of reasonable intelligence to find the claim and trace the lines." (Lindley on Mines, § 381.) The courts always construe these notices liberally, and if, by any intendment, the proof can be reconciled and made consistent with the statement contained in them, the jury will be allowed to say whether or not, upon the whole proof, the identification of the claim is sufficient.

2. At the close of plaintiffs' case, defendants asked the court to direct a nonsuit upon the grounds (1) that the plaintiffs had failed to show title in themselves, and (2) that they had failed to show that they had been ousted by the defendants, or, if they did show an ouster by defendants, they had failed to identify the area from which they had been ousted. Sufficient has already been said as to what the proof tended to show touching the facts of plaintiffs location, and we think the plaintiffs made out a sufficient case in this regard to go to the jury upon the testimony of the engineer and Bramlett alone. Moreover, the statements of Bramlett are materially

aided by those of other witnesses who were subsequently examined by the plaintiffs, and particularly by the statement of the witness Geiger, who fixed the location of the Golden Eagle claim almost exactly in accordance with the statement in the notice. He was also corroborated by Geiger, Roderick, and others as to the presence upon the ground of the monuments placed there by him to mark the boundaries. These witnesses saw at various times from early in August, 1892, some or all of them; and Roderick states that they all remained there until it was discovered in the spring of 1896 that the northwest corner had disappeared, when he assisted Bramlett in replacing it.

The defendants contend that the five posts put upon the claim by Bramlett do not mark the boundaries sufficiently. But, under the authorities already cited, this was for the jury, and not for the court, to say, after hearing the proof.

We cannot sustain the contention that the proof fails to show an ouster by defendants, or the area from which the plaintiffs were excluded. The area in conflict is clearly shown by the testimony of Jaqueth, aided by the plat. It is shown by designated metes and bounds. True, this area is not described in the complaint, but the contention is not that the pleading is not sufficient, but that the proof is not sufficient.

As to the ouster, the plaintiff's evidence showed that defendant Flick in 1895 was actually at work on the lead upon which the Blacktail discovery was made, and within the conflicting area. He had a man by the name of Preston working at that point. He had previous to this time, in 1895, notified the plaintiffs not to do any other work upon the lead. The plaintiffs were then at work taking out ore at the point marked "Blacktail Tunnel" on the plat. He claimed that this was upon the Bell claim, and that it belonged to him. He remained there and continued the work. He had also been at work there some in 1894. Taking this proof in connection with the fact that the boundaries of the Bell claim cover a considerable portion of the Blacktail, it sufficiently establishes an ouster of the plaintiffs from that part of the claim. An

entry upon the land of another under assertion of title is an ouster. (*West v. Lanier*, 9 Humph. 762.) In *Ewing v. Burnet*, 11 Pet. 52, it is said: "An entry by one man upon the land of another is an ouster of the legal possession arising from the title, or not, according to the intention with which it is done. In legal language, the intention guides the entry, and fixes its character." (See, also, *Bath v. Valdez*, 70 Cal. 350, 11 Pac. 724, and *Lindley on Mines*, Sec. 537 *et seq.*) It is rarely the case that actual possession of a mining claim is maintained at all times. It is not often that one is inclosed. The possession is constructive, being drawn to the owner by virtue of his location. When, therefore, another enters upon the claim, asserting ownership therein by virtue of an alleged superior title based upon a location, and exercises dominion over it to the exclusion of the rights of the owner, this amounts to an ouster. We think the evidence on the part of the plaintiffs sufficient to show *prima facie* ownership in plaintiffs, and an ouster from the conflicting area by defendants.

3. Engineer Jaqueth was asked to point out the exterior boundaries of the Bell claim. This was in connection with his detailed statement, illustrated by the plat, touching the relative positions of the two claims and the conflicting area. The defendants objected to the question, as tending to bring out an immaterial matter. The court properly permitted him to answer. The evidence tended to enlighten the jury and give them a clear idea of the controversy between the parties.

4. This witness was also called to testify for the defendants in support of the Bell location. He was asked the following question by counsel for defendants: "I will ask you to state whether a practical and experienced engineer and surveyor, familiar with the methods of locating claims and familiar with surveys in mountainous countries, and with a knowledge of the neighborhood, could take the description given in the notice of (the Bell) location, and, starting at the point of discovery, find the ground or claim included within and known as the Bell location?" This was objected to by plaintiffs, and excluded by the court, as incompetent. A spe-

cific ground of objection, also, was that the question called for the opinion of the witness as an expert, and not for a statement of fact. Defendants' contention is that the evidence called for should have been admitted in support of the description and references contained in the notice of the Bell location. They insist that the question calls for a statement of fact, and not for an opinion or conclusion. The witness was not examined as an expert. No ground had been laid for this purpose. The question was addressed to him as a practical observer. Nevertheless, even from this view, the objection was sufficient to require a ruling by the court. The affirmative answer evidently expected by counsel would have been equivalent to a statement by the witness that a practical and experienced engineer, familiar with surveys in mountainous countries, with the methods of locating claims in such places, and with a knowledge of the neighborhood, could take the description in the notice, and, starting at the discovery, find the claim. This is not a statement of any fact the witness had learned, or could have learned, through his organs of sense. It is simply an opinion as to what would be the probable result of a trial made by a practical and skilled engineer under a given state of facts. The inquiry appertained to no "question of science, art or trade." It was directed to a determination of the question of the sufficiency of the acts done by a third person for the purpose for which they were intended, viz., the identification of the Bell claim. This was the question to be answered by the jury upon the same facts which were within the knowledge of the witness. The trial court was therefore clearly right in refusing to permit the witness to state his opinion to the jury.

The defendants cite *Dillon v. Bayliss*, 11 Mont. 171, 27 Pac. 725, as supporting their contention. In that case evidence of the same character was offered by the defendant for the purpose of rebutting and overturning the presumption established in favor of plaintiff's claim by the introduction of the notice of location, and the evidence in support of it. The objection made was that the notice was conclusive as to the

matter stated in it. This Court held that the notice is not conclusive, but that the description and references contained in it can be shown to be unintelligible and delusive. The question of whether the opinions of engineers or prospectors can be admitted for this purpose was reserved, for the court say, "Let it be well understood that we pass upon the objection as it was made and sustained." (11 Mont. 183, 27 Pac. 728.) This case is therefore no authority in support of defendant's contention. Other witnesses examined by defendants were asked substantially the same question. Objection was properly sustained to all of them.

This witness (Jaqueth) was further asked whether he found the boundaries of the Blacktail claim without assistance; whether the blazing upon the posts at the west end appeared to be old or new; whether the marks on the boundaries of the Bell claim appeared to be old or new; whether he could readily find the blazes on the trees along the end lines of the Bell claim, and whether they could be traced or observed from one to the other. Similar questions were put to other witnesses. The court sustained objections to them all on the ground that they called for the opinion of the witnesses. These rulings were clearly wrong. Witness Jaqueth had already been permitted to answer the first of these questions when upon the stand for the plaintiffs. It might have been excluded upon the ground that it was a repetition, but it was clearly competent as reflecting upon the condition of things found upon the ground at the time of the survey. There was a sharp conflict in the testimony as to whether some of the monuments had ever been put upon the Blacktail claim,—particularly as to the northeast and northwest corners. There was some evidence tending to show that these corners had not been put up at the date of the Blacktail location. There was the same controversy as to the situation of the posts upon the Bell claim, and whether they had been put there as early as claimed by defendants. There was also a controversy as to the existence of blazes on the trees along the boundaries of this claim. The evidence sought to be brought out was certainly mate-

rial, and not open to the objection made. It all consisted of matters of fact, a knowledge of which was gained by the witnesses from observation upon the claim.

5. With the single exception of the particulars just mentioned, the rulings of the trial court upon the admission and exclusion of evidence were correct, so far as our attention has been called to them. In instructing the jury, however, the court adopted an erroneous view of the law touching the rights of defendants under the Bell location. The evidence introduced by defendants tended to establish the following: Defendant Flick went alone upon the ground covered by the Bell claim on July 8, 1892,—four days before Bramlett went there. He was without tools, but went over the ground to see if he could find anything. At the point marked on the plat "Discovery Shaft," he found a lead cropping out of quartz in place, bearing gold. After examining the lead, which he could follow along by its croppings, he cleaned off the surface of a tree standing at the discovery point, and wrote upon it, in plain view: "The Bell claim. Located July 8th, 1892. I claim 1,500 feet in length on this lead, with twenty days for prospecting. [Signed] J. J. Flick." Thereupon, after prospecting along the lead for a while, he went away to look for feed for his horses. Having found none, the following days until the 14th were spent in looking for a camping place where it could be had. He returned to the claim on the 14th in company with one Shaughenassy. They prospected on the claim and in its vicinity on that and the following day. On the 16th, after prospecting over the ground again with Shaughenassy, he proceeded to complete the location by putting up four corner and two end stakes, beginning at the east end center stake. He put up this and the northeast and southeast corners, blazing along the line as he went. He then returned to the discovery, and blazed along through on the outcrop to the west end, where he put up two corner stakes and a center stake, blazing out the lines. The stakes were made by cutting off trees four or five feet from the ground and squaring the stumps, except at the northwest

corner, where he found a stump 20 feet high, which he squared as it stood. All of these monuments were marked, "Northeast corner of the Bell claim," "East end center stake of the Bell claim," etc. The distances and directions were estimated; the intention being to locate 100 feet easterly and 1,400 feet westerly from the discovery, and 300 feet on either side. A notice was posted at the discovery, substantially the same as the declaratory statement filed for record. This declaratory statement was subsequently prepared by a notary and left with him for record, but was not recorded until August 2, 1892. A copy of this was introduced in evidence. No objection was made as to its sufficiency in substance and form. It is not necessary to note it, further than to mention the fact that it contains the statement that "said quartz lode was discovered on July 8, 1892." Other evidence tended to establish the good faith of Flick in completing his location; claiming that his right dated from July 8th, the time at which he made his discovery. Defendant Rockefeller was joined as one of the locators when the declaratory statement was made out.

Defendants' contention at the trial was that, Flick having made his discovery and posted his notice upon the ground on the 8th of July, their claim thereto was superior to that of plaintiffs, that this act on the part of Flick withdrew the ground which was claimed in his notice from exploration by others, and that, plaintiffs having made their location within the 20 days during which the ground was not open to location, their location was void, as to the conflicting area, and they acquired no right thereto, notwithstanding defendants failed to make their record within the 20 days. The court entertained a different view of the law, and proceeded upon the theory that, inasmuch as the plaintiffs made their location and recorded their declaration before the defendants did, they acquired a right to the conflicting area, to the exclusion of defendants. We quote the fourth paragraph of the charge, as illustrating the view the court held, and the theory upon which the case was submitted to the jury:

“You are instructed that if you find from the evidence that the defendants discovered the Bell lode or claim on the 8th day of July, 1892, before they had a valid or could have had a valid and subsisting right to said lode or claim, as against any person who had acquired an adverse right thereto, the defendants must have distinctly marked the location on the ground, so that its boundaries could be readily traced, and made and filed in the office of the county clerk and recorder in the county where such claim was situated an affidavit of the location thereof. If the defendants failed to do any one of these things, then, as against the plaintiffs, if the plaintiffs had made a valid location of the same, or any portion of the same ground, by discovery and location and recording, between the said 8th day of July, 1892, and the 2d day of August, 1892, the plaintiffs’ right to the land in controversy would be valid, and a better right, and you will find for the plaintiffs.”

Under the court’s view of the law, as stated here, the jury could not have found for the defendants, in any event, unless they found Bramlett’s location bad; for there is no controversy but that Bramlett finished whatever he did in the way of making his location on the 12th, or that he filed his statement for record on the twentieth day thereafter. And although the defendant Flick made his discovery and posted his notice on the 8th, still this gave him no rights at all, if he did not finish his location within the 20 days, and get his notice on record, no matter what were his intentions, or whether he was acting in good faith or not. The question presented is not without difficulty, but we think the result of the decisions of the courts upon similar controversies logically leads to the conclusion that, if Flick actually posted the notice in plain view upon the exposed lead, as claimed by him, on July 8th, and thereafter during the 20 days intended in good faith to secure his claim by completing his location, no failure on his part to make such a location and proper record within the 20 days would inure to the benefit of plaintiffs. In *Doe v. Waterloo Mining Co.*, 70 Fed. 455 (a similar case, decided in

1895), it was held that the discoverer of a mineral vein should have a reasonable time after his discovery to complete his location; the length of time depending upon the situation of the ground, its character, the means of marking, the boundaries, and the abilities of the discoverer to ascertain the course or strike of the vein. The court held this to be the rule in the absence of local rules and regulations fixing the time within which the location might be completed. In this case 20 days were held to be reasonable. The supreme court of Nevada announces the same rule. (*Gleason v. Martin White Mining Co.*, 13 Nev. 442.)

Wherever there are statutory provisions fixing the time within which, after discovery, the prescribed work necessary to a valid location must be done in order to secure the claim, it is held that the discoverer has the full time provided in the statute to complete it. (Lindley, on Mines, § 339; *Omar v. Sopar*, 11 Col. 380, 18 Pac. 443; *Erhardt v. Boaro*, 113 U. S. 527, 5 Sup. Ct. 560; *Marshall v. Harney Peak Tin Manufacturing Co.*, 1 S. D. 350, 47 N. W. 290; *Sanders v. Noble*, *supra*.) Under our statute now in force (Political Code 1895, §§ 3610-3612), at the time of discovery a notice must be posted at the point of discovery, and it is provided therein what this notice shall contain. The statutes of Colorado and South Dakota contain similar provisions. In *Sanders v. Noble*, *supra*, following the authorities cited, this court held that, upon the posting of the notice at the discovery in compliance with the provisions of the statute, the prospector not only has the full 90 days in which to do the work necessary, but that in marking his boundaries after the work is done he may also swing his claim so as to make it cover the lead to the extent claimed, to the exclusion of others who have sought in the meantime to occupy ground within the possible limits of the claim. Our statute of 1887, under which the locations involved here were made, contained no provision requiring a notice to be posted, but it allowed 20 days in which to complete the location and make the necessary record. (Compiled Statutes, Fifth Division, § 1477.)

It therefore seems to be the inevitable conclusion from the authorities that the defendant Flick, if he posted his notice in good faith, in plain view, with the intention to complete his location within the prescribed 20 days, after prospecting sufficiently to enable him to determine the course or strike of the vein, thereby acquired a right to all the ground along the lead legitimately covered by his notice, to the exclusion of any person endeavoring to locate any part of it by means of a junior discovery.

Recurring now to the notice posted, the amount claimed is simply 1,500 feet along the lead; nothing being said as to the direction in which this was to be measured. In *Erhardt v. Boaro, supra*, a similar notice was considered by the supreme court of the United States. In commenting upon it, Mr. Justice Field said: "The written notice posted on the stake at the point of discovery * * * declares that they [the locators] claim fifteen hundred feet on the lode, vein, or deposit." It thus informed all persons subsequently seeking to excavate and open the lode or vein that the locators claimed the whole extent along its course which the law permitted them to take. It is, indeed, indefinite, in not stating the number of feet claimed on each side of the discovery point, and must therefore be limited to an equal number on each side; that is to seven hundred and fifty feet on the course of the lode or vein in each direction from that point. To that extent, as a notice of discovery and original location, it is sufficient." In posting the notice he did upon the lead, we are of the opinion that Flick thereby established a right for the statutory period of 20 days to 1,500 feet along the lead, but that he was limited in this right to 750 feet on either side of the point of discovery. The fact that in making the location thereafter he included within his boundaries ground not legitimately covered by his notice, if this were done in good faith, as the result of ignorance or inadvertence merely, would not invalidate his claim, in so far as it includes what was legitimately covered by the notice. In no event would any error or misprision on his part in endeavoring in good faith to com-

plete his location inure to the benefit of the plaintiffs under their location, made on July 12th, as to any ground covered by it which comes within the limits embraced by Flick's notice. To the extent, then, of 750 feet along the lead easterly and westerly from the discovery on the Bell claim, the ground was not open to exploration during 20 days after July 8th. In so far, therefore, as any of this ground is covered by the Blacktail claim, the latter should be held invalid, provided Flick's good faith in posting his notice is established by the proof.

The instructions of the court on this branch of the case, as illustrated by the paragraph quoted, were therefore erroneous and prejudicial to the defendants. They are therefore entitled to a new trial upon the lines herein indicated.

We are requested to pass upon the question as to whether the evidence is sufficient in any event to warrant a verdict for plaintiffs. As there must be a new trial, we decline to express any opinion on this point.

Many other questions have been urged upon the attention of the court, but we think enough has been said herein to guide the court below in trying the cause anew.

Let the judgment and order appealed from be reversed, and the cause be remanded, with directions to grant defendants a new trial.

Reversed and Remanded.

DOWTY, RESPONDENT, v. PITWOOD, APPELLANT.

[No. 1408.] •

[Submitted June 21, 1899. Decided July 3, 1899.]

*Municipal Corporations—Officers—Qualification of Aldermen
—Act Regulating—Constitutionality—Repeal—Amendment—Construction.*

1. In view of Political Code, Section 5160, adopted February 25, 1895, providing that laws passed at the session of the legislative assembly at which the Code was passed must be construed as if both had been passed on the last day thereof, and Section 2, providing that the Code shall not take effect until July 1, 1895, Compiled Statutes 1867,

- Div. 5, Section 365, relating to the qualification of aldermen, could not have been repealed or abrogated by the Code before July 1, 1895, and hence the act of March 7, 1895 (Political Code, Section 4753), amending it, was a valid amendment of an existing law, and became, under the act of March 18, 1895 (Political Code, Section 5180 *et seq.*), effective as a part of the Code on and after July 1, 1895.
2. The act of March 7, 1895, entitled "An act to amend Sections 364 and 365 of the Fifth Division of the Compiled Statutes of Montana, and the amendments thereto, approved September 14, 1887, relating to the qualifications of mayors and aldermen and declaring the same, does not conflict with Constitution, Art. 5, Section 23, declaring that an act shall not embrace more than one subject, which shall be clearly expressed in its title.
 3. The act does not violate Constitution, Art. 5, Section 25, providing that no law shall be revised, amended, or extended by reference to its title only; but so much as is revised, amended or extended shall be re-enacted and published at length.
 4. Political Code, Section 4753, providing that no person shall be eligible to the office of alderman, unless a resident of the ward where elected "for at least one year preceding such election," means one year next preceding the election.

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

CONTEST of an election by David Dowty against William H. Pittwood. From a judgment in favor of contestant, the contestee appeals. Affirmed.

Mr. Fletcher Maddox and Mr. J. W. Freeman, for Appellant.

Messrs. Stanton & Stanton, for Respondent.

MR. JUSTICE HUNT delivered the opinion of the court.

Pittwood ran against Dowty for alderman of the first ward of the city of Great Falls at a city election held April 3, 1899. Pittwood was thereafter declared elected. Dowty then brought this action, under section 2010 *et seq.* of the Code of Civil Procedure, to contest Pittwood's election, upon the ground that Pittwood was ineligible, for the reason that he had not been a resident of the ward for one year preceding his election. Pittwood moved to strike this allegation from Dowty's statement, but the motion was denied. Judgment was thereafter entered in favor of respondent, Dowty, and annulling Pittwood's certificate of election.

Pittwood appeals, assigning as error the order of the lower court denying the motion to strike out, and the rendering of

judgment that he (Pittwood) was ineligible, and annulling his certificate of election. Section 4753 of the Political Code declares that "no person shall be eligible to the office of alderman unless he shall be a taxpaying freeholder within the limits of the city and a resident of the ward so electing him, for at least one year preceding such election." The Compiled Statutes of 1887 contained a section (365), in effect like section 4723 of the new Codes of 1895, *supra*. Section 365 referred to was one of the Act of March 10, 1887, which was Chapter XXII., of the Compiled Statutes. (Comp. St. 1887, Fifth Division, § 315 *et seq.*) By an act entitled "An act to amend an act relating to the formation of municipal corporations," approved September 14, 1887, (Laws 15th Ex. Sess. 1887, p. 62), section 365 was amended by omitting the qualification that required an alderman to be a freeholder. Later amendments, in 1889 and 1893, to the municipal corporation statutes are not pertinent to the matter under examination. Then came the passage of the Political Code, on February 25, 1895, section 17 of which is as follows:

"No statute, law, or rule is continued in force because it is consistent with the provisions of this Code on the same subject; but in all cases provided for by this Code all statutes, laws and rules heretofore in force in this state, whether consistent or not with the provisions of this Code, unless expressly continued in force by it, are repealed and abrogated. This repeal or abrogation does not revive any former law heretofore repealed, nor does it affect any right already existing or accrued, or any action or proceeding already taken, except as in this Code provided, nor does it affect any private statute not expressly repealed."

Afterwards, on March 7, 1895, the legislature passed an act entitled "An act to amend sections 364 and 365 of the fifth division of the Compiled Statutes of Montana and the amendments thereto, approved September 14, 1887." Section 2 of this act just referred to is the present section 4753, *supra*, Political Code. Pittwood argues from these facts that section 4753 is void, because section 365 of the Compiled Stat-

utes, which is sought to amend, had been repealed by the adoption of the Political Code, on February 25, 1895,—10 days prior to the enactment of section 4753. Section 292, Political Code, provides that an act amending a section of an act repealed is void.

Section 17 quoted, of the new Political Code, did not repeal the whole of the Compiled Statutes, or of the statutes which were in force, but only such statutes as were inconsistent, or were not consistent, with the provisions of the new Codes *on the same subject*, except where the new Codes expressly continued the old statutes in force. Now, section 4752 of the Political Code of 1895, providing that no person is eligible to any municipal office, elective or appointive, who is not a citizen of the United States, and who has not resided in the town or city for at least two years immediately preceding his election or appointment, and is not a qualified elector thereof, fixed the qualifications of all persons to hold any municipal office. The section was one upon the same subject as section 365 of the Compiled Statutes,—that is to say, it covered the question of the qualifications to hold *any* municipal office; and, if the Political Code had gone into effect from the date of its passage, Code, § 4753, would have, undoubtedly, been a repeal of section 365 of the Compiled Statutes. But there is also a further provision to be considered (section 5160 of the Political Code), which is as follows:

“With relation to the laws passed at the session of the legislative assembly at which the Political Code, Civil Code, Code of Civil Procedure and Penal Code, are passed, such Codes must be construed as though each had been passed on the last day of the session.”

This provision bears directly upon the question before us, inasmuch as section 4753 was part of an act passed at the session of the legislative assembly at which the Political Code was passed, and therefore the Political Code is to be construed as though it had been passed on the last day of the session of 1895, which was March 7, 1895, when section 4753 also became a law. From this it follows that under no cir-

cumstances could section 17, *supra*, of the Political Code have repealed and abrogated section 365 of the Compiled Statutes before the last day of the session. But, furthermore, section 2 of the Political Code provides that that Code should take effect at 12 o'clock noon, the 1st day of July, 1895. Before then it was inoperative upon existing laws; so that section 17 *supra* could have had no effect before July 1, 1895; nor could section 292, relating to amendments. This being true, the Compiled Statutes were the laws in effect and controlling on March 7, 1895, when the act of which section 4753 is a section was passed, and by section 5182 of the Political Code these laws remained in effect until July 1, 1895, when the new Codes and the acts of the third and fourth sessions of the legislative assembly, amendatory thereof, went into force, and swept away all other statutes of a general nature existing and in force prior to July 1, 1895.

From this it must follow that the act of March 7, 1895, amending section 365 of the Compiled Statutes of 1887, was a valid amendment to an existing law; and, as we hold said act is not in conflict with sections 23 and 25 of Article V. of the constitution, it therefore became, under the provisions of the act approved March 13, 1895, (section 5180 *et seq.*, Political Code), part of the Codes of the state, effective on and after July 1, 1895. Patient examination of all the statutes cited and others forces us to adopt this construction, support for which we also find in the principles heretofore applied in the cases of *State ex rel. Aachen v. Rotwitt*, 17 Mont. 41, 41 Pac. 1004; *Steele v. Gilpatrick*, 18 Mont. 453, 45 Pac. 1089; *Proctor v. Cascade County*, 20 Mont. 315, 50 Pac. 1017, and *Jobb v. Meagher County*, 20 Mont. 424, 51 Pac. 1034.

2. Appellant had been a resident of the ward for less than five months immediately preceding the city election. It is urged in his behalf that section 4753 does not require that the year's residence provided for be a year *immediately* preceding the election, but that the law is satisfied by a residence of a year *some time* before an alderman's election. We cannot agree to this construction; for, in our opinion, it is against

the intention of the legislative assembly, which, in adopting the statute, never meant to depart from the underlying principle pervading all government in our form of securing representation by one who has resided a length of time in the locality from which he is chosen to act in a representative capacity, and that such residence should be immediately prior to his election. Our opinion as to the meaning of the statute in this respect is strengthened by examining section 4722 of Title III. of the Political Code, pertaining to cities and towns, which prescribes that electors of an incorporated city, in addition to other qualifications, shall have resided within the limits of the city for six months, and in the ward in which they vote for thirty days, "preceding the election," while section 4755 provides that all qualified electors who have resided in the city for six months and in the ward for thirty days "next preceding the election" are entitled to vote at any municipal election. Comparison of these sections demonstrates that the expressions "preceding the election" and "next preceding the election" were used as equivalent in meaning, and, in our judgment, they were so used in sections 4752 and 4753.

The judgment must be affirmed.

Affirmed.

STATE, RESPONDENT, v. ALLEN, APPELLANT.

[No. 1,350.]

[Submitted June 19, 1899. Decided July 8, 1899.]

Criminal Law—Homicide—Verdict of Conviction—Sufficiency of Evidence—Appeal—Review of Instructions—Rules of the Supreme Court—Specifications of Error—Taking Exhibits to Jury Room—Waiver of Objection.

1. A verdict of conviction of murder will not be disturbed where there is evidence to support it. It is not the province of the appellate court to usurp the office of the jury or the function of the trial court.
2. A failure to comply with Subdivision 3 of Rule V. of the Supreme Court, providing that, when the error alleged is to the charge of the court, the specification shall set

93	118
23	328
23	118
24	123
23	118
26	4
23	118
27	304
23	118
28	328
23	118
38	44

out *totidem verbis* the part referred to, whether it be instructions given or instructions refused, is sufficient warrant for refusing an examination of the charge on appeal.

3. Where appellant complains of the charge, but points out nothing to his prejudice, it is not incumbent on the court to search for possible errors.
4. Where, on a prosecution for murder, the counsel for the defendant, in defendant's presence, consents to the taking to the jury room of certain exhibits admitted in evidence, such consent is a waiver of any objection to the sending of said exhibits to the jury while in retirement.

Quære.—Whether, under the provisions of Section 2122 and Subdivision 2 of Section 2192 of the Penal Code, it is error to send to the jury while in retirement such exhibits, admitted in evidence, as the skull of the decedent, his bloody hat and a certain blood-stained sack found at the place of the killing; or whether, without the defendant's consent, but in the exercise of a wise and sound discretion, the court may send to the jury in retirement exhibits other than papers.

*Appeal from District Court, Lewis and Clarke County;
Henry C. Smith, Judge.*

JOSEPH ALLEN was convicted of murder, and from a judgment sentencing him to death, and an order denying his motion for a new trial, he appeals. Affirmed.

Mr. J. M. Clements, for Appellant.

Mr. C. B. Nolan, Attorney General, for the State.

MR. JUSTICE PIGOTT delivered the opinion of the court.

Joseph Allen, charged by information with the crime of deliberate murder, committed upon one J. S. Reynolds on the 24th day of July, 1898, at the county of Lewis and Clarke, and convicted by a jury of murder in the first degree, appeals from the judgment sentencing him to death, and from an order denying his motion for a new trial.

The judgment and order are attacked upon these grounds:

1. It is claimed that the verdict is contrary to the evidence. The attentive consideration which we have given to the record enables us to express the opinion that there was ample evidence adduced tending to prove defendant's guilt of the crime of which he stands convicted, and to support the verdict rendered. The defendant, while admitting the killing, claimed that the act was done in self-defense; but the evidence tends strongly to show that he killed the decedent

while the latter was asleep, for the purpose of gaining possession of a check payable to the order of the decedent, and which the defendant afterwards indorsed, and of certain personal property on the body of the decedent. The jury might, it is true, upon the testimony have found the defendant guilty of murder in the second degree, or of manslaughter, or might have acquitted him, for there was evidence from which inferences favoring homicide in self-defense, murder in the second degree, and manslaughter, respectively, might have been deduced by the triors of fact; but the jury were evidently satisfied that the only legitimate inference was that the defendant had committed a deliberate murder. We cannot declare that the evidence presented was of such character and effect that it ought to have left in the minds of the jurors a reasonable doubt of the defendant's guilt. It is not the province of this court to usurp the office of the jury or the function of the trial court.

2. The defendant asks us to review the charge of the court for the purpose of discovering whether error was committed in the instructions; but the brief fails to comply with that portion of subdivision 3 of Rule V. of this court, applicable alike to criminal and civil cases, providing that, when the error alleged is to the charge of the court, the specification shall set out *totidem verbis* the part referred to, whether it be instructions given or instructions refused. This omission is sufficient to warrant us in refusing to examine the charge. (*Babcock v. Caldwell*, 22 Mont. 460, 36 Pac. 1081; *Gibson v. Hubbard*, 22 Mont. 517, 57 Pac. 88; *Anderson v. Carlson*, 23 Mont. 43, 57 Pac. 439.) Moreover, upon the argument counsel was unable to point out any misdirection or nondirection prejudicial to the defendant. Under such circumstances the obligation to search the charge for possible error is not incumbent upon this court.

3. The skull of the decedent; his hat, spotted with blood, and worn by him at or immediately prior to the time, and discovered at the place of the killing; and a certain blood-stained sack, found near the scene of the homicide,—were ex-

hibited to the jury, admitted in evidence without objection, and used on the trial. After the jury retired to consider of their verdict, they requested the bailiff to bring the skull, hat, and sack into the jury room for their inspection; whereupon the court, being of the opinion that the exhibits mentioned were proper for the jury to have for further inspection, ordered the bailiff to comply with the request, and the exhibits were then taken into the jury room, where they were used by the jury. It does not appear, however, that any experiment was made with any of the exhibits. The defendant earnestly contends that the reception of these exhibits by the jury out of court is, under the provisions of section 2122 and subdivision 2 of section 2192 of the Penal Code, an error entitling him to a new trial. If the foregoing were all the facts touching the matter, necessity would arise for determining the question of whether such instruments of evidence were rightly sent to the jury room,—the answers to which are not entirely uniform, as will appear by reference to the following cases: *State v. Webster* (Wash.) 57 Pac. 361; *Dr. Jack v. Territory*, 2 Wash. T. 101, 3 Pac. 832; *People v. Page*, 1 Idaho, 106; *Powell v. State*, 61 Miss. 319; *State v. Stebbins*, 29 Conn. 463; *State v. McCafferty*, 63 Me. 223; *Hansing v. Territory*, 4 Okl. 443, 46 Pac. 509; *Yates v. People*, 38 Ill. 527; *Forehand v. State*, 51 Ark. 553, 11 S. W. 766. Nor is it needful to decide whether, without the defendant's consent, but in the exercise of a wise and sound discretion, the court may send to the jury exhibits other than papers. On the hearing of the motion for a new trial there was a sharp conflict between witnesses with respect to whether or not the defendant consented to the sending of the skull, hat, and sack to the jury during their retirement. The county attorney and a juror testified that, just before the jury retired, counsel for the defendant consented and agreed in the presence of the defendant, and in open court, that the exhibits mentioned might be taken to the jury room; and the juror further testified that, as soon as the jury discovered that the said exhibits had not been brought into the room, they directed the bailiff

in charge to get them. The defendant and his counsel testified that neither of them ever consented or agreed to the taking of these exhibits to the jury room. The presumption is that the trial court, to which was addressed the application for a new trial, found against the defendant upon the issue thus presented, and, there being a substantial conflict in the testimony, this court must indulge the conclusive presumption that the decision is supported by the weight of the evidence; hence we have no right to disturb its action, unless there was error in sending the exhibits to the jury even with the consent of the defendant. We are of the opinion that the consent given by the attorney for the defendant in the presence of the defendant was the consent of the defendant himself, and that such consent was a waiver of the objection, made on the motion for a new trial, to the sending of the exhibits to the jury while in retirement, and eliminates the question whether error might well be urged had consent not been given. (See *People v. Mahoney*, 77 Cal. 529, 20 Pac. 73.)

The judgment and order are affirmed.

Affirmed.

23	122
24	149
124	383
23	122
30	183
23	122
39	410

FORRESTER AND MACGINNISS, RESPONDENTS, v. BOSTON & MONTANA CONSOLIDATED COPPER & SILVER MINING CO. ET AL., APPELLANTS.

[No. 1,385.]

IN THE MATTER OF THE PETITION OF CERTAIN
OF THE APPELLANTS TO PROVE
EXCEPTIONS.

[Submitted June 12, 1899. Decided July 10, 1899.]

Bill of Exceptions—Original Proceeding for Leave to Prove Exceptions—Immaterial Amendments—Contempt—Mandamus.

1. An original petition in the supreme court for leave to prove exceptions, under Sec. 1157 of the Code of Civil Procedure and the rules of the Supreme Court,—the ground

of the application being that certain amendments, not in accord with the facts, were allowed by the trial judge to the bill of exceptions as served—will be dismissed, where the amendments allowed are immaterial.

Obiter.—There is no necessity of including in a bill of exceptions an order appealed from, which merely denied a motion to vacate the appointment of a receiver; such order is deemed excepted to, and may be presented as part of the record proper by a copy certified as correct by the clerk.

2. A bill of exceptions, as presented for settlement, contained a copy of the order appealed from, which merely denied the motion to vacate the appointment of a receiver. The amendment to the bill, proposed and allowed, set out that the court refused to grant the motion to discharge the receiver because defendants had refused to comply with the order appointing the receiver, and had violated it, and stood charged with contempt of court, to which the judge directed to be added a statement corroborating such alleged facts. No such reasons were announced, either by express words or by implication, at the time the order was made. *Held*, that the reasons for the refusal of the order were immaterial, since the court, having "heard" the motion involving substantial rights, could not punish for contempt by deciding against the movants, and hence the Supreme Court cannot strike out such amendments from the bill, under Code Civ. Proc. § 1157, though it may disregard them.
3. A writ of mandate will not issue to a trial judge, commanding him to hear and determine an application to vacate an order appointing a receiver, where he makes it appear to the Supreme Court by his return that the movants are in contempt.

ACTION by James Forrester and John MacGinniss against the Boston & Montana Consolidated Copper & Silver Mining Company and others. Original proceeding by certain of defendants for leave to prove exceptions. Denied.

Mr. Wm. H. De Witt, Mr. Wm. Scallon, Mr. W. W. Dixon, Mr. Ransom-Cooper, Messrs. Forbis & Evans, Mr. Wm. Wallace, Jr., and Messrs. Carpenter & Carpenter, for Appellants.

In some of the decisions the Court may find that the question of *mandamus* as against a district judge to compel him to sign a bill of exceptions is discussed. We think *mandamus* is an ordinary law remedy which could be applied in the absence of a statute, such as 1157 C. C. P. and Rule IV of this court.

If the *mandamus* were issued against a district judge, apparently it would go simply to the extent of compelling him to act in some way, without designating how he should act and without correcting any of such judge's wrongdoings. But our statutory and court rule goes farther. It allows this court to review an action of the district judge when he has not allowed an exception in accordance with the facts, and it

furthermore provides that the Supreme Court shall ascertain the facts, and then, by its chief justice, settle the bill of exceptions.

We contend that the case of *Hale v. Ditch Co.*, 2 Mont. 489, is not in point in this case. If the Court, however, should disagree with us, and hold that that decision is in point, we submit to the deliberate consideration of this Court the statement that the Hale-Ditch Co. case ought not to be sustained. The Court can readily understand the conditions out of which that decision arose. At that time there were no court stenographers in the state; evidence was taken hastily and imperfectly by counsel or their long-hand clerks. If controversies arose between counsel on settling a bill of exceptions, such controversies must have been resolved in some way, and probably the only safe way was by dependence upon the judge's recollection. We think both the members of this court and counsel can remember very unsatisfactory contentions of this sort. But we have changed all this. The proceedings are now all taken by skilled stenographers and the statute of the state goes so far as to enact that the report of the stenographer shall be *prima facie* evidence of its correctness. (C. C. P., Sec. 377.) The record is here certified by the official reporter. Therefore, the Hale-Ditch Co. case ought not to apply to present conditions.

Assume a case with a stenographer and five respectable counselors at law, or a greater number of creditable witnesses, who testify, not from recollection, but positively, that certain facts occurred on a trial, and, on the other hand, the judge should state that his recollection was to the contrary. We submit that a party should not be prejudiced by such a situation. If the Hale-Ditch Co. case is to prevail, then a judge with a faulty memory, or a judge who is unfair, could absolutely ruin an appeal where the testimony was overwhelming that the facts were different from those certified by the judge.

The Hale-Ditch Co. case, however, has no support in any authority. It is unsupported by "*In re Thompson*," 9 Mont.

388, because in the Thompson case there had been no attempt in any way to correct what was certified as the judge's recollection. The case is not supported by any other state, and the decisions of California, under a similar statute, are directly opposed to it.

It cannot be claimed that this statute confers upon the appellate court no power other than to compel the trial judge to settle the bill of exceptions. Such power is inherent in the absence of any statute, and is exercisable through *mandamus*. The Court may at any time, by its own order, command the judge to settle the bill, but it may not advise him how to settle unless empowered by some legislative measure. Clearly the purpose of the legislators was to supplement the Court's jurisdiction and enable it to review for adjudication the bill incorrectly settled by the judge below. Otherwise the statute is mere impotent surplusage on the books. It gives nothing, means nothing, and for the careless, defective ruling of a trial judge there is no remedy. As early as 1866, Justice Sander-son, of the California court, defining the practice authorized by this statute, said:

"A motion to correct a statement of exceptions where the court below refused to make the same conform to the facts is an original proceeding in this court, and must be instituted by a petition in writing setting forth at length the exceptions which were taken at the trial and not allowed by the judge, and so much of the evidence as may be necessary to illustrate them."

This doctrine is sustained in the estate of W. W. Hill, 62 Cal. 186.

It is the duty of the judge in settling the bill to make it conform to the facts. 89 Cal. 592. If he does not do so, the appellate court will interfere. 49 Cal. 263, 76 Cal. 284, 75 Cal. 230.

In the case of a refusal by the judge to allow an exception the Supreme Court will interfere to correct the bill. 86 Cal. 352, 87 Cal. 392, 89 Cal. 590.

The correction in a bill of exception is to be sustained by the preponderance of the evidence. 85 Cal. 214.

The case of *Baird et al. v. Glecklar*, South Dakota, 52 Northwestern 1097, discusses at length the questions herein involved.

The settlement of a bill of exceptions is reviewable before the Supreme Court. *Severson v. M. M. Mutual Ins. Co.* (S. D.), 53 Northwestern 860.

The California cases are overwhelmingly favorable in the construction of the statute as above discussed. The practice upon which we insist, while not declared in positive terms, is implied and recognized as a matter of course in the following cases: 49 Cal. 510, 68 Cal. 414, 72 Cal. 227, 73 Cal. 1, 75 Cal. 230, 85 Cal. 214, 108 Cal. 32.

Messrs. Cullen, Day & Cullen, Mr. R. B. Smith, Messrs. Clayberg & Corbett, and Messrs. McHatton & Colter, for Respondents.

MR. JUSTICE PIGOTT delivered the opinion of the court.

This is an original proceeding for leave to prove certain exceptions which the petition states the judge of the Second judicial district court has refused to allow in accordance with the facts. The petitioners are the Boston & Montana Consolidated Copper & Silver Mining Company, John F. Forbis, G. H. Hyams, and Frank Klepetko, the answering defendants in *Forrester & MacGinniss v. Boston & Montana Consol. C. & S. Mining Co. et al.*, several phases of which case have been before this court in 21 Mont. 544, 55 Pac. 229; 21 Mont. 565, 55 Pac. 353; 22 Mont. 220, 56 Pac. 219; 22 Mont. 241, 56 Pac. 281; 22 Mont. 376, 56 Pac. 687; 22 Mont. 438, 56 Pac. 865; 22 Mont. 352-430, 56 Pac. 1135, 868. The petition purports to be drafted under the provisions of section 1157 of the Code of Civil Procedure, and of subdivision 14 of Rule IV., now Rule V, of this court. It appears that the petitioners moved the district court to vacate the order of December 15, 1898, appointing a receiver for the property of the defendant company, and to discharge him; that a hearing was had in obedience to the mandate of this court (*State ex rel.*

Boston & Mont. Consol. C. & S. Mining Co. v. Second Judicial District Court, 22 Mont. 438, 56 Pac. 865); that on April 10, 1899, the court denied the motion, and defendants appealed to this court (*Forrester et al. v. Boston & Montana Consol. C. & S. Mining Co.*, 22 Mont. 430, 56 Pac. 1134, 868), where the cause is now pending. It further appears that the defendants served a draft of their bill of exceptions, to which plaintiffs proposed 10 amendments. Upon presentation for settlement, the judge allowed nine of the amendments, besides making an addition of his own, and ordered that the bill, as so amended, be engrossed and settled. Four of the amendments allowed are asserted to be discordant with the proceedings had upon the hearing of the motion, and one is said to be contrary to the facts attending the making of the order appealed from. Defendants therefore contend that the judge refused to allow their exceptions in accordance with the facts, and pray that the facts touching the matters to which the amendments are directed, and the refusal of the judge to allow the bill as presented, may be proved and certified under the provisions of section 1157 and the rules of this court. A referee was appointed *ex parte*, and without notice to the plaintiffs, and he has reported the testimony taken by him in support of the petition.

The petition must be dismissed upon the ground that the amendments allowed are immaterial; hence we do not consider or decide, but expressly reserve, all questions which might arise, were the amendments material, in respect of the power and right of the supreme court, under section 1157 and Rule V., to alter or remodel a bill of exceptions allowed by the trial judge; nor, on the present application, is it necessary either to interpret or construe the section. The avowed purpose of incorporating the amendments was to show that the defendants, and particularly the Boston & Montana Consolidated Copper & Silver Mining Company, were in contempt of the district court during the hearing of the motion, and at the time it was denied; for example: the bill, as presented for settlement, contains a copy of the order appealed from,

which merely overruled and denied the motion to vacate the appointment of the receiver,—in passing, we may say that there was no necessity of including the order in the bill, for it is deemed excepted to, no bill of exception is required, and it may be presented as part of the record proper by a copy certified as correct by the clerk; the amendment proposed and allowed in that regard sets out that “the court refused to grant the motion to discharge the receiver upon the ground and for the reason that the defendants in the case had refused to comply with the court’s order contained in the order appointing the receiver, and had resisted and violated the same, and that the said defendants stood charged with contempt of this court, and therefore were not entitled to be heard or to have said motion granted, and thereupon said court overruled said motion,” to which the judge directed to be added the following: “The court being of the opinion that on account of the contemptuous conduct of the defendants aforesaid, and their position before the court, they were not entitled to any relief asked, or to a consideration of their motion by the court, and the court denied the same for that reason; it appearing clearly from the evidence presented on the hearing of the motion that defendants had violated the order of the court appointing the receiver, and were during the course of the hearing violating the same, and doing everything in their power to avoid a compliance therewith, and were avoiding service of the process of this court issued in this action.” The testimony taken and returned by the referee shows very clearly that no such reasons were announced, either by express words or by implication, at the time the order was made, and that, if they existed, they were known only to the judge of the court, who omitted to reveal or confide them to those whose interests were, as he evidently believed, seriously affected thereby. But the reasons so given are not material to any issue or question presented on the appeal, and this court, although it may disregard, has no power, by virtue of section 1157 or otherwise, to strike out such matter from a bill. It may be conceded that the trial court might justly

have refused to entertain the motion to discharge the receiver on the ground that the defendants were then in, or perhaps even charged with, contempt of its order or process, or to decide it until the moving parties had purged themselves of a contempt brought to the court's knowledge after the beginning of the hearing. In this case, however, the court did not refuse to hear the motion, neither did the court decline to decide. Both a hearing and a determination were had and made, respectively; and in a matter not of mere favor or privilege to a litigant, but involving substantial rights, a court cannot, without committing gross and palpable error, punish a party charged with contempt by deciding against him the cause or proceeding in which the contempt is alleged to have occurred. If it could, then, for instance, a demurrer interposed to an insufficient complaint may properly be overruled because the demurrant is in, or is charged with, contempt. If it could do so, then the court can rightly direct the jury to find against a party in contempt, although he would, except for the contempt, be entitled to recover. Such practice would be a travesty of justice. It will not be tolerated in a land where the fundamental principles of the common law are the rules of action.

Counsel for the plaintiffs suggest, tentatively, that the district court and judge were compelled by our writ of mandate to hear and determine the application to vacate the order appointing the receiver while the defendants were in open defiance of said order, and that the judge "preferred, rather than to make answer to the alternative writ setting forth as a ground of his refusal to hear the application, the facts showing the defendants to be in contempt, to proceed with the hearing under the writ of mandate, and to deny the application for that reason." Reference to the opinion in *State ex rel. Boston & Montana Consol. C. & S. Mining Co. v. Second Judicial District Court et al.*, 22 Mont. 438, 56 Pac. 865, shows that the district judge stated the reasons in detail why he had not heard the motion, and declared that in any event he intended to hear the motion on April 3, 1899, with-

out regard to whether or not this court should issue a peremptory writ. Now, it appears that the answer to the alternative writ was made on April 1, 1899, and that the proceedings against the defendants for contempt were instituted in the district court, and before its judge, on the 13th and 15th days of March, 1899,—some two weeks theretofore. The pretended excuse attempted to be made in behalf of the judge for the omission of the reasons mentioned from his answer and return is not even plausible. Moreover, instead of making the return to the peremptory writ show that he declined to decide the motion to discharge the receiver because the defendants' contempt had been proved since his answer to the alternative writ, he made a final return on April 10th that he had determined the motion. Had he made it appear to this court that the defendants were in contempt, it is hardly necessary to say that he would not have been commanded to entertain or to pass upon the application while that condition of affairs existed. The conduct of the judge to which we have adverted is unworthy of emulation.

No one of the amendments by which the draft of the bill of exceptions is changed is either material or relevant, for the question to be considered upon the appeal will be whether or not the order appointing the receiver should have been vacated, and that officer discharged. The proceedings as for contempt, of which the defendant company has been subsequently adjudged guilty, are wholly foreign to the question.

The prayer of the petition is therefore denied, and the petition dismissed, at the costs of the applicants.

Dismissed.

STATE EX REL. LAMBERT, RESPONDENT, v. COAD,
APPELLANT.

[No. 1,386.]

[Submitted July 3, 1899, Decided July 12, 1899.]

*Mandamus—Issuance by Justices of Supreme Court—Board
of County Commissioners—Contract—Lowest Bidder.*

1. If it is necessary (under Section 1961 of the Code of Civil Procedure of 1896) that two Justices of the Supreme Court should concur in the issuance of an alternative writ of mandamus, where the application is made to two Justices, and the order directing the clerk to issue the writ is signed by only one of them, the other concurring, the writ is properly issued.
2. Session Laws of 1897, page 48, Section 12, provided that the commissioners of B county should contract with the lowest responsible bidders for transcribing and indexing certain records. The board, without advertising for bids. or any notice of its intention to let a contract, entered into an agreement with relators, whereby they agreed to do the indexing at a stipulated wage per month. Held, that the contract was void for want of compliance with the law, in that the county commissioners disregarded its requirements, both in failing to let the contract to the lowest bidder and in severing the work to be done and letting it under separate contracts to different parties.

Appeal from District Court, Broadwater County; F. K. Armstrong, Judge.

APPLICATION for a writ of *mandamus* by George Lambert against B. S. Coad, as clerk and recorder of Broadwater county. From a judgment granting a peremptory writ, respondent appealed. Reversed.

STATEMENT OF THE CASE.

Application for a writ of *mandamus* to compel the defendant, as clerk and recorder of Broadwater county, to permit relator to have access to the public records of said county for the purpose of indexing the same.

The material allegations of the affidavit are: That relator is engaged in the business and work, as hereinafter set forth, of indexing certain of the public records of the property in said county of Broadwater. That B. S. Coad, the defendant,

23	131
23	171
23	173

23	131
26	33
26	86

23	131
28	364
28	366

23	131
30	86

23	131
41	296
41	549

is, and at all times hereinafter mentioned was, the clerk and recorder of said county of Broadwater, duly elected, qualified and acting, and that it is his duty, as such officer, under the laws of this state, to have the custody of the public records of the property lying in said county, and to grant access to such records, under reasonable restrictions, to all persons authorized pursuant to law to perform public service or duties which require such access to be had. That by Section 12 of an act passed by the Fifth Legislative Assembly, approved February 9, 1897, creating the county of Broadwater, and providing for its organization and government, the board of commissioners thereof were empowered, and it was made their duty, to let a contract for the indexing of the records of the property lying in said county that were in said act required to be transcribed from the original records thereof. That on the 3d day of January, 1899, the said board, finding that those engaged in the work of indexing said records were unduly and unseasonably prolonging the work, and said employes being hired by the month, called a special session of the board to meet on the 11th day of January, 1899, for the purpose of discharging the employes then engaged in indexing the records, and employing affiant and one G. R. McDonald to do the work in their stead, they being the lowest responsible bidders. That said meeting was also called for the transaction of any other business that might come before the board. That the call for the meeting was published in the Townsend Star, a newspaper of general circulation in the county of Broadwater, for five days preceding the 11th day of January. That on that day the said board, by the authority of said Section 12 of the act creating Broadwater county, contracted with the relator and the said McDonald for the doing of the indexing aforesaid yet remaining undone. That said action of the board was evidenced by a resolution of the board passed on that day as follows: "In accordance with the provisions prescribed in the order which calls for the special session, it is ordered that Mr. Combs, Mr. Long and Mr. Depew, now engaged in indexing the county records, be discharged this af-

ternoon, and the clerk is instructed to settle the balance of wages due them by issuing warrants for the same; also that George Lambert is engaged as indexer, and G. R. McDonald as assistant indexer, to do the remainder of the county indexing, unless otherwise ordered by the board. George Lambert's wages is fixed at \$100 per month, and G. R. McDonald's at \$80 per month. The clerk is instructed to allow George Lambert and G. R. McDonald free access to all books necessary to the performance of their duties. Said new employes are to take up their work on Thursday, the 12th inst., and conduct such work in the office of the county clerk." That thereupon the relator and the said McDonald accepted the terms of said resolution, and on the 12th day of January, 1899, pursuant to their engagement under the same, applied to defendant, as clerk and recorder aforesaid, for access to the records of said county of Broadwater for the purpose of doing said indexing. That said defendant, disregarding his duties in the premises, then and there refused, and has ever since refused, to permit relator to have access to said records for the purposes named in the resolution, thereby depriving relator of his rights in the premises, and preventing him from the performance of his engagement, to his damage in the sum of \$1,000; and that relator has no other plain, speedy and adequate remedy at law for the redress of the injury thus done him by defendant. The affidavit closes with a prayer that an alternative writ of mandate issue commanding B. S. Coad, defendant, to allow relator access to the records of Broadwater county for the purpose of indexing the same, or to show cause why he should not do so.

On February 7, 1899, on application to two of the justices of this court, the clerk of the court was directed to issue the alternative writ, but to make the same returnable before the Honorable Frank K. Armstrong, judge of the Ninth judicial district, at such time and place as he might fix for the hearing. The Honorable Frank K. Armstrong fixed the time for the hearing of the same, and made it returnable before him at the city of Bozeman, Mont., on the 18th day of February,

1899, at the hour of 10 in the forenoon. Thereafter, on the 13th day of February, 1899, the defendant entered his appearance to said writ, and filed a motion to quash the same, alleging as grounds for his motion, among other things, which are not material to notice: (1) That the writ was not issued by the supreme court, or a majority of the justices thereof, as provided by law, but by a single justice thereof; and (2) that relator's affidavit fails to state facts sufficient to entitle him to a writ of mandate. On the 18th day of February this motion was heard by the said judge and overruled. The defendant was then given until the 23d day of February, 1899, to file his answer, which was done on the 21st day of that month. Defendant therein denies all of the material allegations set forth in the affidavit, and then sets up various matters by way of affirmative defense, which we shall not notice beyond stating that upon the hearing had before said judge at chambers on the 13th day of March, 1899, they were, on motion, stricken out. At the same time the said judge proceeded to hear the proofs, and after such hearing, entered judgment that a peremptory writ of mandate issue, directed to the defendant, commanding him to "allow the relator herein, George Lambert, and G. R. McDonald, to have access at reasonable hours to the public records of said Broadwater county for the purpose of indexing the same," and adjudging defendant to pay the costs of this proceeding. From this judgment defendant has prosecuted his appeal to this court.

Mr. E. H. Goodman and *Messrs. Sanders & Sanders* for Appellant.

Mr. J. E. Kanouse and *Mr. E. A. Carleton*, for Respondent.

MR. CHIEF JUSTICE BRANTLY, after stating the case, delivered the opinion of the court.

1. Counsel for appellant seriously urge in their brief that the motion to quash the writ should have been sustained on the first ground laid therein. They insist that the conclusion

reached by this court in *State ex rel. Leech v. Board of Canvassers of Choteau Co.*, 13 Mont. 23, 31 Pac. 879, that an alternative writ of mandate may be issued by any one of the justices of the supreme court, is not now controlling for the reason that the Code of 1895 (Code of Civil Procedure, section 1961) expressly provides that two justices shall concur in issuing this kind of writ. This contention, however, is made upon a misapprehension of the facts touching the issuance of the original writ in this case. The order of February 7th, directing the clerk of this court to issue the writ, was signed by the chief justice only; but this was done after consultation with Mr. Justice Hunt, and he concurred in the order. It was not deemed necessary that both justices should sign it. It is therefore not necessary to notice this contention further. But we are not to be understood, from what is here said, as expressing any opinion as to whether the conclusion reached in *State ex rel. Leech v. Board of Canvassers of Choteau Co.*, *supra*, is now obsolete in view of the provisions of the section of the Code just mentioned. This question is left for future consideration, when it properly arises.

2. The second ground of the motion brings in question the power of the board of commissioners of Broadwater county under the act of the legislative assembly creating that county and providing for its government. The territory erected into this county consisted of portions of Jefferson and Meagher counties. The act, after creating the new county, and providing for its government until the next general election, provides for the transcribing and indexing of the records of property within its limits, as follows:

“The county commissioners of said county of Broadwater are empowered and it is hereby made their duty to contract with the lowest responsible bidder for transcribing and indexing all records of property lying and being within the limits of the county of Broadwater, which transcripts when compiled shall be compared with the original records by the county clerk of the county from whence they are respectively taken, and when correct shall be by him so certified under

his official seal, and thereafter the records so transcribed and certified to shall be received and admitted in evidence in all courts of law in this state, and be in all respects entitled to like faith and credit as said original records. The county clerks of Jefferson and Meagher counties shall receive for their services in comparing and certifying to the correctness of the copies of said records six (\$6.00) dollars per day, respectively, while engaged in said labor, which amounts shall be paid by the county of Broadwater on the completion thereof." (Sess. Laws 1897 p. 48, sec. 12.)

We observe that the object of this section is to secure to the new county complete records of the instruments in any way affecting the title of property lying within its limits by means of authenticated copies from the original records of Jefferson and Meagher counties. It specifically provides that it is the duty of the commissioners to have these records transcribed and indexed. It leaves them no option in the matter. It provides how they shall be obtained, and the mode of their authentication. The design was thus to serve the convenience of citizens in the examination of titles, and in the production of evidence in their local courts. In order that the work might be done as cheaply as possible, it was made the duty of the board to let the whole matter of transcribing and indexing to the lowest responsible bidder. It was desired that the county should have the benefit of competition among those bidding for the work, and the fact that competition is provided for implies that the letting of the contract should be so conducted by the board that those caring to enter into the competition should have notice of the time and place the contract would be let. Evidently, also, it was intended that the price of the work should be a sum fixed in the contract, either by naming a lump sum, or by fixing a price per folio and entry, and that a time should be agreed upon on or before or within which the copied records would be in the hands of their own officers for the use of the citizens. The facts set forth in the affidavit show that the transcribed records were already in the hands of defendant, and that a con-

tract was made between the board and plaintiff and G. R. McDonald on the 11th day of January, 1899, by which the latter were to do the indexing at the rate of \$100 and \$80 per month, respectively. In other words, the board, by that contract, hired these persons as indexer and assistant indexer at a fixed wage for such time as it would require to do the indexing. There was no notice of the letting of such or any contract, and there was, therefore, no competition, such as the provision of the statute contemplates. The question presented here, then, is: did the board, in hiring the plaintiff and McDonald to do the indexing, pursue their authority under the statute, and make a valid contract? Under our statute a county is a body politic and corporate, and has such powers as are conferred by the code and special statutes. (Political Code, section 4190.) Its powers are exercised through a board of commissioners, and this board has jurisdiction and power, under such limitations and restrictions as are provided by law. (Id. section 4230.) A county is not, in a strict sense, a municipal corporation. In the sense, however that its board of commissioners has no power other than is derivable expressly or by necessary implication from the provisions of the statute defining their powers, it comes within the rules and principles of law applicable to such corporations. In either case the executive body of the municipality must pursue the authority vested in it by statute. It is the general rule that, when the authorities of a municipality are required by statute to let contracts to the lowest bidder, a contract not so awarded is illegal. (Tiedeman on Municipal Corporations, section 172.) Bids need not be called for unless the statute requires it; but if notice, advertising, and similar preliminaries are required, a contract entered into without attention to these preliminaries will be held invalid. *Id.*; (*Zottman v. City and County of San Francisco*, 20 Cal. 97; *Nicolson Pavement Co. v. Painter*, 35 Cal. 699; *Maxwell v. Board of Supervisors*, 53 Cal. 389; *Carter v. Kalloch*, 56 Cal. 335; *Mappa v. City Council*, 61 Cal. 309; *Brady v Mayor, etc.*, 20 N. Y. 312; *McDonald v. Mayor, etc.*, 68 N.

Y. 23; *Dickinson v. City of Poughkeepsie* 75 N. Y. 65; *In re Manhattan R. Co.*, 102 N. Y. 301, 6 N. E. 590; *People ex rel. Coughlin v. Gleason*, 121 N. Y. 631, 25 N. E. 4; *Board of Commissioners v. Gillies*, 138 Ind. 667, 38 N. E. 40.) The same rule applies to the letting of contracts on behalf of the state; and, before a contract can become valid and binding upon the state, the statutory formalities must be complied with. (*State ex rel. Woodruff-Dunlap Printing Co. v. Cornell*, 52 Neb. 25, 71 N. W. 961; *Dement v. Rokker*, 126 Ill. 174, 19 N. E. 33.) In the latter case the court say: "Letting by contract to 'the lowest responsible bidder' necessarily implies equal opportunity to and freedom in all whose interests or inclinations might thus impel them to compete at the bidding. No one may be compelled to bid at such a letting, but there must be entire fairness and freedom in competition. * * * The manifest purpose in requiring the contract to be let to 'the lowest responsible bidder' is to protect the state against imposition and extortion." In *State ex rel. Woodruff-Dunlap Printing Co. v. Cornell*, *supra*, it was also held that where the statute provided that one part of the state printing should be let in one contract, and then proceeded to designate several other classes of work, each of which it directed to be let in another contract, it was not within the power of the printing board to sever any of the classes, and let the work to separate bidders. The action on the part of the board in severing the work and letting it to different bidders was no more than an attempt to award the contract in a manner not allowed by law. In the case at bar the commissioners were not only not guided by the provisions of the statute, but they disregarded its plain provisions and requirements, both in failing to let the contract to the lowest bidder and in severing the work to be done and letting it under separate contracts to different parties. The county thus fails to get the benefit of the competition provided for in the statute, and the purpose of this provision is defeated.

The allegation in the affidavit that the plaintiff and McDonald were the lowest responsible bidders imports nothing, in

view of the other facts stated, from which it appears that they were hired at a fixed rate of wages per month.

Nor do we think the defendant is precluded from asserting the illegality of the action of the board in defense of his action in refusing plaintiff access to the records for the purpose of indexing them. The board's action in letting the contract was simply void for want of compliance with the law. Under the authorities cited, the execution of such a contract, or payment for work done under it, will be enjoined at the instance of a taxpayer, and, when *mandamus* is resorted to to compel recognition of it by the auditing officer whose duty it is to audit the accounts of the municipality and pay them, no relief will be granted. The court below should have sustained the motion to quash on this ground, and dismissed the application.

In reaching the conclusions we have in this case we have not overlooked the general statute touching the transcribing of records for new counties when created by the legislature (Political Code, Sections 4166-4172, inclusive); nor have we overlooked the provision of our Constitution (Article V, Section 26) prohibiting special or local legislation. No question has been raised here as to the validity of Section 12, *supra*, upon which this application is based. Neither the general provisions touching the transcribing of records cited, *supra*, nor Article V, Section 26, of the Constitution, have been referred to either in brief or argument by counsel on either side. Indeed, the relator, in founding his claim upon Section 12, *supra*, asserts its validity, and we have not felt warranted, under these circumstances, in going into an investigation of its constitutionality.

The judgment of the court below in directing the peremptory writ to issue will be reversed, and the cause will be remanded, with directions to dismiss the application.

Reversed and remanded.

IN RE WELLCOME.

[No. 1,401.]

[Submitted June 12, 1899. Decided July 12, 1899.]

Attorney — Disbarment — Accusation — Bribery and Conspiracy — Crimes Committed Outside of Official Capacity — Jurisdiction of Court.

1. Where an accusation preferred by a private person in a disbarment proceeding, is for a cause named in Code of Civil Procedure, Section 402, Subdivision 5, providing that an attorney and counselor who is guilty of deceit, malpractice, crime, or misdemeanor arising after his admission to practice, may be removed or suspended, an objection that such accusation is preferred by a person not authorized by law to inform the court of the matters therein charged, is without merit.
 2. Proceedings under the fifth subdivision of Section 402 of the Code of Civil Procedure, may be instituted and maintained in the same manner as may those brought under the other subdivisions of said section.
 3. Charges in an accusation against an attorney, in disbarment proceedings, which are indefinite, vague, as well as uncertain, will, on motion, be stricken out.
 4. Under Code of Civil Procedure, Section 402, Subdivision 5, providing that an attorney who is guilty of any deceit, malpractice, crime, or misdemeanor arising after his admission to practice may be removed or suspended, the jurisdiction of the court is not confined to crimes or misdemeanors committed by an attorney while acting in his official capacity.
- Obiter:* Bribery and conspiracy are heinous crimes involving moral turpitude, and the perpetration thereof by an attorney proves his unfitness to practice the honorable profession of the law.
5. Under Code of Civil Procedure, Section 402, Subdivision 5, providing that an attorney and counselor who is guilty of any deceit, malpractice, crime, or misdemeanor arising after his admission to practice, may be removed or suspended, it is discretionary with the court whether it will exercise its jurisdiction to remove or suspend an attorney in such cases, and, where the accused is charged with bribery and conspiracy, the court will refuse to inquire into the truth of the charges, unless cogent reasons be furnished by the accusation, or by a showing in support of it, why jurisdiction should be entertained in advance of a criminal prosecution and conviction.

PETITION to disbar John B. Wellcome. Dismissed.

Mr. C. B. Nolan, Attorney General, amicus curiæ.

Mr. Wm. Wallace, Jr., Messrs. Carpenter & Carpenter, and Mr. J. B. Roote, for Wellcome.

PER CURIAM.—On the 5th day of May, 1899, there was presented to this Court an accusation in writing, verified by the oath of one Fred. Whiteside, charging John B. Well-

come, an attorney and counselor at law of the courts of Montana, with having bribed, and offered to bribe, certain members of the Sixth Legislative Assembly of the State to vote for one William A. Clark, of Butte, a candidate for the office of Senator of the United States from Montana. It is, in substance, alleged, among other things, that Wellcome paid to the members named in the accusation the sum of \$120,000; that he bribed other members, whose names are not given, because at present unknown to the affiant, to support Clark, by paying to them large sums of money; that he conspired with other persons named to secure, by the corrupt use of money, the election of members of the Legislature who would favor the candidacy of Clark, and to influence the official action of the members in voting for a Senator; and that, by means of said briberies, Clark was chosen Senator. The object of the proceeding is to have the accused disbarred, and his name stricken from the roll, upon the ground that the acts charged are crimes, and were committed with the corrupt and wicked purpose of influencing the action of the Legislature in favor of the candidacy of Clark, and that such conduct is incompatible with the dignity and honor of the profession of the law, and proves the unfitness of Wellcome to remain a practitioner. The accused has answered by filing objections to the sufficiency of the accusation (Section 423, Code of Civil Procedure), in which he asks that certain parts be stricken out as uncertain, indefinite, vague, and ambiguous, and by which he moves the dismissal of the accusation because: (1) it is not preferred by any person by law authorized to prefer such charges; (2) the Court has no power to consider charges looking to the disbarment of an attorney of this Court where the accusation is based upon alleged felonies or misdemeanors involving moral turpitude not committed while acting in his official capacity as an attorney; (3) the Court has no jurisdiction in a proceeding of this kind to adjudge an attorney guilty of a crime not perpetrated while acting in his official capacity; (4) the accusation is in particulars specified vague, ambiguous, unintelligible, uncertain, and indefinite.

So much of Section 402 of the Code of Civil Procedure as concerns this proceeding reads: "An attorney and counselor may be removed or suspended by the Supreme Court or by the district courts of the state, for either of the following causes, arising after his admission to practice: (1) His conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction is conclusive evidence. (2) Willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with, or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney and counselor. (3) Corruptly or willfully and without authority appearing as attorney for a party to an action or proceeding. (4) Lending his name to be used as attorney and counselor by another person who is not an attorney and counselor. (5) Who is guilty of any deceit, malpractice, crime or misdemeanor."

1. There is no merit in the objection that the accusation, which is for a cause named in the fifth subdivision of section 402, is preferred by a person not authorized by law to inform the court of the matters therein charged. True, Section 418 of the Code of Civil Procedure, in providing that proceedings under the second, third or fourth subdivisions of Section 402 may be taken by the court for matters within its knowledge, or may be taken upon information of another, omits reference to the fifth subdivision; yet subsequent sections, notably sections 420 and 428, contemplate that accusations may be brought for the causes mentioned in the fifth subdivision; and, in any event, the mere failure expressly to prescribe the medium through which the court may be informed of conduct constituting cause sufficient for disbarment or suspension will not be permitted to deprive the court of the right to adopt some appropriate method enabling it to take cognizance of the offenses denounced. It is not reasonable to presume that the legislature solemnly enacted a law, and then intentionally sought to destroy its efficacy and force by omitting to provide a remedy. We think the proceedings under

the fifth subdivision may be instituted and maintained in the same manner as may those brought under subdivisions 2, 3 and 4.

2. So much of the accusation as charges a conspiracy to secure by the corrupt use of money the election of members of the legislature who would be favorable to Clark, and also that part of the accusation alleging that Wellcome and his co-conspirators paid out large sums of money to aid in the election of such members, with the understanding that the money should be used corruptly to influence the action of the electors at the polls in voting for such members, are severally indefinite and vague, as well as uncertain. The motion to strike is granted as to these averments, which are made in the first and second paragraphs of the sixth division of the accusation; in other respects the motion is denied.

3. We are of the opinion that the design of the legislature in enacting the first subdivision of section 402 was to make it incumbent upon the court to remove an attorney and counselor upon receipt of a certified copy of the record of his conviction in this state, subsequently to his admission to the bar, of either a felony or misdemeanor involving moral turpitude, whether such felony or misdemeanor was committed while acting in his official capacity or not. (Sections 417, 418, Code of Civil Procedure.) In such case, the court has no discretion, but must adjudge that the name of the offending attorney be stricken from the roll, and that he be precluded from practicing in any of the courts of the state (Section 428, Code of Civil Procedure; *In re Bloor*, 21 Mont. 49, 52 Pac. 779); and it seems immaterial whether the felony was perpetrated before or after his admission to practice. On the other hand, under the section last cited (428), if an attorney be found guilty of an act falling within the purview of subdivision 5, the judgment may be either removal or suspension, according to the gravity of the offense charged. This subdivision does not make conviction a prerequisite to the removal or suspension of the offender, nor does it require that the crime or misdemeanor must be one involving moral turpitude; neither is

its operation limited to offenses committed in the state, nor is it confined to crimes or misdemeanors committed by an attorney while acting in his official capacity. Dueling, and accepting or sending a challenge to fight a duel, are denounced as felonies, but moral turpitude is not necessarily involved in either. Every libel is declared to be a misdemeanor, but not every libel involves moral turpitude; and so with many other offenses. It is apparent that the court could not, under the first subdivision of Section 402, disbar an attorney upon inspection of the record of his conviction of any of the crimes named; nor would the court, in a proceeding brought for the cause stated in that subdivision, have the right to examine the evidence for the purpose of determining whether or not the circumstances of the particular case disclosed the presence of such turpitude; for moral turpitude must inhere in the nature of the crime, and not depend upon the ethical quality of the acts constituting such crime. But by virtue of Subdivision 5 the court is empowered, not commanded, to remove or suspend in such cases, according to the gravity of the offense as shown by the proofs adduced. Subdivision 1 has to do with public offenses necessarily involving moral turpitude, of which convictions are had in the courts of Montana, and to none other; whereas, Subdivision 5 is broad enough in its language, and sufficiently comprehensive in substance, to embrace all public offenses, wheresoever committed, by attorneys, and to clothe the court with jurisdiction of an accusation imputing to an attorney the commission of any crime or misdemeanor wherever the offense of itself involves, or the circumstances of its perpetration reveals the existence of, moral turpitude, or the facts attending it evince such gross misconduct as exhibits his unfitness to remain in the profession. The fifth subdivision, notwithstanding its ungrammatical construction, seems to have been enacted *ex industria*, to the end that the court may purge the bar of those attorneys whose characters, as illustrated by the evidence establishing the truth of the charges preferred, lack the attributes of morality which are an essential to admission,

and which should be required as a continuing condition of the right to practice.

Bribery of a member of the Legislature is a felony. (Title VI, Part 1, Penal Code [Sec. 160 *et seq.*]) If the accused be guilty of the conspiracy and many briberies charged against him in this proceeding, it is manifest that he has perpetrated heinous crimes involving moral turpitude, thereby proving his unfitness to practice the honorable profession of the law.

Whether this Court will exercise its jurisdiction in cases of crime or misdemeanor falling within the purview of Subdivision 5 is discretionary. Unless cogent reasons be furnished by the accusation, or by a showing in support of it, why jurisdiction should be entertained in advance of a criminal prosecution and conviction, we shall refuse to act. The presumption is that the ordinary machinery of trial courts will be adequate for the investigation and determination of such cases, and it is but just and fair to the accused that the usual proceedings be employed and exhausted before bringing the matter here. That such a rule should guide the Court is apparent, when we reflect upon the result of holding otherwise. This member of the bar might be charged with manslaughter; another with gambling in his own home; that one with assault with intent to do great bodily harm; another with making a bet on the result of an election; another with killing a deer out of season; another with renting a building knowing that it is to be used for a lottery drawing; another with having given intoxicating liquors to a person who is in the habit of getting drunk or intoxicated; another with knowingly permitting Canada thistles to go to seed upon lands under his control. Thus the calendar of the Supreme Court might be crowded with accusations against lawyers, not for wrongs done while acting in their professional capacities, but who may have violated the Penal Code of the State in other respects, yet who may not have been officially charged with crime. The accusation before us states nothing suggesting a reason why Wellcome cannot be prosecuted, and, if guilty, convicted, upon the very charges the truth of which this Court

is asked to try and determine. We decline to inquire into the truth of the charges, and place our refusal on the ground that the accusation fails to state any facts warranting the exercise of the jurisdiction sought to be invoked, which should be exerted in extraordinary cases only, and even then sparingly.

The objections to the sufficiency of the accusations are overruled. The attorney general, who appears as *amicus curiæ*, may, if he desires, within five days, amend the accusation, or file affidavits disclosing grounds for the interposition of this Court, or both, and the accused will answer to the accusation within five days after service upon him or his attorneys of record of a copy of such amendment or affidavits. In default of the filing of such amendment or affidavits, the proceeding will be dismissed.

STATE, RESPONDENT, v. BROOKS, APPELLANT.

[No. 1,413.]

[Submitted July 3, 1899. Decided July 13, 1899.]

*Criminal Law—Homicide—Insanity—Character—Evidence
Instructions—Burden of Proof—New Trial—Conduct of
Jury.*

1. Where there is no evidence showing that a defendant charged with murder was insane, evidence of his declarations and conduct is inadmissible to prove insanity, unless the purpose of such evidence is disclosed.
2. Evidence that a defendant had preached in a church at divers times is inadmissible to prove his good character.
3. On a murder trial, where instructions upon the law of justifiable homicide are unnecessary, it is not error, that defendant can complain of, to give such instructions.
4. Where evidence proved murder in the first degree, an instruction that, to make the killing manslaughter, it must be done "upon the instant,—that is, at the time the provocation is given, and under the influence of it, before the blood has had time to cool, and before the mind has had time to consider the character and gravity of the act about to be done, and not from hatred or pre-existing revenge," is not prejudicial to defendant.
5. It is not error to instruct the jury that a homicide would not be manslaughter if committed in an unreasonable fit of passion.
6. An instruction that, "if defendant was so far in possession of his mental faculties as to be capable of knowing that the act of killing was wrong, any mental defect which

23	146
23	873
23	374
23	875
23	146
24	90
23	146
26	58
23	146
28	27
23	146
30	35
30	269
23	146
31	487
32	454

might cause him to more readily give way to passion than a man ordinarily reasonable could not be considered," is not prejudicial to a defendant who claimed to be insane and was convicted of murder in the first degree.

7. A new trial will not be granted for newly discovered evidence which is cumulative merely.
8. Where jurors in a capital case agreed upon a verdict of guilty on the third ballot, to which all agreed, when polled, it will not be set aside because one of them stated in the jury room, before the informal ballot was taken, that he was "willing a majority should rule."
9. On a trial for murder, it is proper to charge "that, upon proof of the commission of the homicide by the defendant, the burden of proving circumstances of mitigation or excuse devolves upon him, unless the proof on the part of the prosecution tends to show that the crime only amounts to manslaughter, or that he was excusable," under Penal Code, Section 2081, regulating the burden of proof in such cases.
10. It is not error to refuse to instruct, in a murder case, that defendant should be acquitted if a fair preponderance of evidence shows his insanity; the correct rule being that he is entitled to an acquittal where the evidence raises a reasonable doubt of his sanity when the crime was committed.

Appeal from District Court, Yellowstone County; C. H. Loud, Judge.

DEFENDANT, William C. Brooks, was convicted of murder in the first degree, and he appeals. Affirmed.

Mr. Charles L. Harris, for Appellant.

The court's action and ruling regarding the admission of evidence was clearly erroneous under the following authorities: *State v. Mewherter*, 46 Ia. 88; *State v. Hays*, 22 La. Ann. 39; *State v. Kelly*, 57 N. H. 549; *State v. Bauerman* (Kas.), 53 Pac. Rep. 874; *State v. Brooks*, 4 Wash. 328; *State v. Hurst* (Idaho), 39 Pac. Rep. 554; *People v. W. Wreden*, 59 Cal. 392; *People v. Sanford*, 43 Cal. 29; *State v. Erb*, 74 Mo., 199; *State v. Baldwin*, 12 Mo. 223.

The trial court erred in the instructions given, and for this reason the case should be reversed under the following authorities: *State v. Rolla*, 21 Mont. 582; 56 Pac. 523; *State v. Sloan*, 22 Mont. 293, 56 Pac. 364; Bishop's Crim. Law, Vol. II, Secs. 697, 712, 713.

Mr. C. B. Nolan, Attorney General, for the State.

The affidavits in support of the ground of newly discovered evidence cannot be considered for the purposes designed. There does not appear in a single affidavit presented a fact or

circumstance or occurrence which would warrant the deduction that the defendant was insane. Instead of giving the conclusion of the affiant that the defendant in his judgment was insane, it was incumbent upon him to set forth the acts or conduct of the defendant which occasioned the belief on the part of the affiant that the defendant was mentally unbalanced. It is a settled law in this state that nonprofessional witnesses who are acquainted with the defendant, and have observed his actions and manner of life, may give in evidence their opinions as to his sanity or insanity on a trial for murder. Before this opinion is admissible it is essential that the facts upon which it is predicated must be submitted. (*Territory v. Hart*, 7 Mont. 489; see, also, *State v. Bauerman*, 53 Pac. Rep. 874; *Baughman v. Baughman*, 32 Kan. 538; *Carpenter v. Hatch*, 64 N. H. 573; *Insurance Co. v. Lathrop*, 111 U. S. 612; *State of Washington v. C. Brooks*, 4 Wash. 328; *State v. Erb*, 74 Mo. 199; *State v. Klinger*, 46 Mo. 229; Bishop, New Crim. Pro. Vol. II, Sec. 678.) The affidavits failing to disclose facts upon which an opinion is based must be disregarded.

Assuming that the affidavits are sufficient in form, is the newly discovered evidence sufficient to warrant a new trial? Thompson in his work on trials, Section 2762, discusses what is essential when application is made for new trial on the ground of newly discovered evidence. He says that the affidavit should state:

1. That the applicant has been vigilant in preparing his cause for trial. (2.) That new and material facts have been discovered since the trial, which could not by reasonable diligence have been produced at the trial; stating what the evidence is. (3.) That such evidence will tend to prove facts, which were not directly in issue on the former trial, or were not then known or investigated by proof, or that it will produce a different result at a second trial. (4.) Such affidavits should give the name or names of the witness or witnesses, by whom such facts can be proved.

The affidavits tested by this standard are wholly insufficient. The evidence at best is cumulative, no reasonable ex-

cuse is offered why the evidence could not be secured upon a former trial, and it does not appear that if a new trial were granted a result different from that obtained would be secured. Newly discovered evidence is tolerated rather than favored because of its liability to abuse and its tendency to mislead. (*Erskine & Co. v. Duffy*, 76 Ga. 103.) As to the insufficiency of the showing made, reference is made to the following authorities: (*Chandler v. Smith*, 70 Ill. App. 658; *Sisler v. Shaffer*, 43 W. Va. 769; *Albright v. Hannah*, 103 Ia. 98; *Turner v. State*, 37 Tex. Crim. Rep. 451; *Lafevre v. De Brule*, 71 Ills. App. 263; *Williams v. The People*, 164 Ill. 481; *Newton v. Cook*, 33 S. W. Rep. 934; *Territory v. Bryson*, 9 Mont. 33; *Harris v. The State*, 97 Ga. 408; *Hillman v. White*, 46 Pac. Rep. 111; *Hayne v. Chandler*, 99 Ga. 214; *Smith v. The State*, 143 Ind. 685; *Outcalt v. Johnson*, 9 Colo. App. 519; *Robinson v. The State*, 35 Tex. Crim. Rep. 19; *People v. Ah Ton*, 53 Cal. 741; *Lukins v. Garrett*, 2 Kan. App. 722; *Brown v. Mitchell*, 102 N. C. 347; *Wis. Cen. R. R. v. Ross*, 142 Ill. 11; *People v. Baker*, 50 N. Y. Sup. 771; *State v. Davis*, 53 Pac. Rep. 678; *Wright v. Southern Express Co.*, 80 Fed. 85; *Flint & P. M. R. R. Co. v. Marine Ins. Co.*, 71 Fed. 310; *People v. Goldenson*, 76 Cal. 330; *Madison Coal Co. v. Beam*, 63 Ill. App. 179; *McLeod v. Shelby Mfg. & Imp. Co.*, 108 Ala. 81; *Ill. Cent. R. R. Co. v. Truesdell*, 68 Ill. App. 324; *Cropper v. The City of Mexico*, 62 Mo. App. 385; *Linscott v. Orient Ins. Co.*, 88 Me. 497; *Reid v. Flanders*, 62 Ill. App. 106; *Gran v. Houston*, 45 Neb. 817; *O'Hara v. N. Y. C. & H. R. R. R. Co.*, 36 N. Y. Sup. 67; *Robinson v. The State*, 32 S. W. R. 900; *Richardson v. Huff*, 43 S. W. Rep. 464; *Conlan v. Mead*, 172 Ill. 13; *Stewart v. Pattengall*, 91 Me. 173; *Bradley v. Norris*, 67 Minn. 48; *Norfolk v. Johnakin*, 94 Va. 285; *Fall v. Chapman*, 56 Mo. App. 581; *Hammond v. Phillips*, 89 Mo. 70; *Lewis v. Newton*, 67 N. W. Rep. 724; *State v. Lane*, 44 W. Va. 730; *Sullivan v. The State*, 101 Ga. 800; *Sayer v. King*, 47 N. Y. Sup. 422; *State v. Rohrer*, 34 Kan. 427; Bishop's New Crim. Pro. Section 1279.)

MR. JUSTICE HUNT delivered the opinion of the Court.

Defendant, William C. Brooks, was convicted of murder in the first degree, for the killing of Jennie Brooks. He appeals from the judgment sentencing him to death, and from the order of the district court denying his motion for a new trial.

The evidence of the state disclosed these material facts: Jennie Brooks was the wife of the defendant. The couple had not lived together for some time. On November 18, 1898, between 4 and 5 o'clock in the afternoon, a cry of murder was heard in the neighborhood where Mrs. Brooks lived. Defendant was seen running. at the time this cry was heard, across the street, after his wife; he fired a shot as he got to the gate of the house in which she lived, and followed the woman until they reached the middle of the street, where she stopped, and they had a scuffle, in which she was down on her knees part of the time, reaching out in the direction of the defendant's hand. While in this position he pushed her back and got away from her, and fired another shot at her, asking her if she was shot. She said something in a low tone, then ran away from him and fell dead. The defendant then fired several shots, apparently at himself, and, after doing this, went up to the body of his wife, lying on the face, close to the house, reached over and looked at it, took the revolver, put it down to her ear and fired, saying, "Now you are dead." Defendant then said he would go and give himself up, and again said, "No, I wont; I'll just shoot myself,"—and again shot the revolver off, but, as he did so, dodged his head to the side and avoided the bullets. Defendant then told the officers to come and take him, and said he would give himself up and did so. Mrs. Brooks had no weapon. Defendant, after the shooting, told a witness that it was unnecessary to go through any preliminaries; that they could just take him out and hang him, as he was ready to die,—and handed a bunch of keys to witness, telling him that they were the keys to his place of business, and he desired that his things should be taken and sold.

A boy named Charley Powers, who lived with Mrs. Brooks, testified that, just before the shooting, Brooks went to Mrs. Brooks' house and was standing there, holding the bill of a little live black pigeon in his mouth. Brooks at that time asked his wife what men had been doing about the house about 1 o'clock on Tuesday or Wednesday night. Mrs. Brooks denied that there had been any men about there at that time, and thereupon the defendant called her a "big whore," threatened to kill her and struck at her. She then struck him with a small stick, and then they had a scuffle in which Brooks knocked her down and shot off his pistol, but missed her. This was just before the occurrences out of doors when she was killed.

The substance of the testimony in defendant's behalf was that he and his wife had quarreled a great deal, and that the separation just before the killing was at least the third that had occurred between them. They had had a quarrel on the evening of November 14th. Defendant himself did not go on the witness stand, and relied upon insanity as a defense. To sustain this plea he called a witness named Scott, who testified: That he had known defendant for about four years. That he had never paid much attention to the actions, speech, appearance, and peculiarities of the defendant, but that on one day defendant called witness, and wanted him to rent a church "down there." Witness told him, "Yes;" that, if they rented it out in the winter, they could make money enough out of it to fix it up; that the rental was to be six dollars a month. That defendant went off to fix up the contract, and when he returned, "he had it fixed up for six dollars for six months. So I told him: 'You must be out of your head. A man that would have sense would know better than that.' " Witness said he did not think that he noticed anything peculiar in defendant's action just prior to the homicide; that the defendant was a trustee of the African Church, and a member thereof. This witness was recalled, and gave the following testimony in support of the defendant's plea of insanity: "I testified here this morning that I was present at the colored

church in Billings about the month of September, 1898, at which time there was a disturbance came up in the church, and in which Mr. Brooks was one of the parties engaged. After the preaching was over, they had a minister here, and he wanted to collect some money to fix up the church; and Mr. Brooks drawed out a paper there, and proceeded to the altar to collect some dollar money and Sunday school money to represent our church, and I told him that it wasn't necessary to do that, 'cause we had no church, we simply had the building there, and we had no means, and it was no use to send any money away until we got straight on our feet here. At that time Brooks got excited, you know, because he had everybody up telling him to behave and sit down, or else go home,—one of the two. In regard to his actions he was like any one else, I suppose,—when he would get angry or mad he looked like he was crazy. I couldn't reason with him. I went to his home afterwards and tried to reason with him, but I couldn't do it. This was about an hour after the disturbance that occurred at the church. He would not listen at that time to us at all. When he gets mad he is excited. He was mad that night. He seemed to want to be the leader of our church, and he also wants to be the leader of the colored people of this town. At that time I did not think him crazy. He was excited and strong-headed, and you could not reason with him."

Dr. J. H. Rinehart testified as an expert on insanity. Defendant's counsel put a long hypothetical question to him, based upon every circumstance that could have possibly been deduced from the testimony bearing at all upon the plea of insanity, and then asked him this question: "Would you say that this question contained evidences of insanity?" The doctor's reply was, substantially, that there were a great many evidences of insanity under certain circumstances, which under other circumstances would hardly pass as evidences of insanity, and that there were quite a number of things, in the proposition put, involving symptoms of insanity. It so happened that Dr. Rinehart was a witness of the homicide itself,

and saw everything that occurred after the defendant and his wife left the house. The state called him in rebuttal, and he said that he was not prepared to say whether the defendant was acting like a crazy man or not; that he was "plowing around there in a terribly excited condition," and that while he never had been well enough acquainted with him to form any opinion as to his sanity at that time, yet he had no reason to think that he was insane, from his actions, because he was not intimately enough acquainted with him to decide whether he was or not; that he always considered him a sane man, from what he knew of him, and had no reason to think for a moment that he was insane.

Another witness, who had known the defendant for four or five years, and had seen him frequently, testified on rebuttal that he would say that defendant was a sane man, and that at the time of the killing the thought never entered his head that Brooks was insane.

1. A witness for the defense, who testified that defendant and his wife quarreled a great deal, was asked if defendant ever stated to him anything in relation to his domestic troubles. Objection was made on the ground that this was hearsay testimony, and the court sustained the objection, defendant preserving his exception. We see no error in the ruling of the court. The witness to whom this question was put was the first called by the defendant. It was not stated to the court that the object of the question was to disclose the insanity of the defendant, nor had there been any offer of proof to that effect up to that time. The revelancy or materiality of the question did not appear by the question itself,—on the contrary, it appeared to call for incompetent testimony, and the court correctly sustained the objection at the time of the ruling.

2. The court declined to permit another witness for defendant to be asked if defendant ever delivered any discourses in the African Church. The object of this question defendant's counsel stated to be to show that defendant "was a devoted Christian." We think that the court properly excluded this

testimony. Defendant had a right to put his character in issue, but it was not competent to prove good character by showing that defendant had preached at divers times. If the object was to show insanity, that object was not disclosed by the question or statement of counsel.

3. The same witness was asked what, if anything, defendant had said to him on the streets of Billings at half past 1 o'clock on the day of the homicide. This was excluded, and we think properly so, upon the ground that it apparently called for hearsay testimony in defendant's behalf. If its purpose was to show insanity, such purpose should have been disclosed.

4. Josephine Samples, called by defendant, after testifying that Brooks and his wife quarreled a great deal, was asked if she knew whether or not defendant ever charged his wife with infidelity. The court sustained an objection to this question, and the witness was not allowed to answer. Counsel for defendant did not state to the court that the object of this question was to prove the issue of insanity of the defendant, nor was the question put to the witness as if with the object of eliciting evidence that the defendant was insane when he killed his wife. Under the circumstances, therefore, we do not see how it became material; but, assuming it was a proper question upon any other issue, no harm could have resulted to defendant, because it appears by the testimony of witnesses for the prosecution, and it was not denied, that the defendant called his wife a "whore" a few minutes before he killed her, and had asked her who the men were that had been in her house at midnight on several evenings before the day of the killing. Thus evidence of an assertion of the infidelity of his wife, and accusations of such infidelity, were before the jury, and were afterwards embraced in a hypothetical question put to a physician called by defendant as an expert on insanity.

But, up to the point of the ruling just adverted to, no witness had testified that in his opinion defendant was of unsound mind; nor had defendant's counsel stated that the object of

his interrogatories was to prove insanity. .. While it is clearly the right of a man charged with crime to plead insanity as a defense, and in support thereof to introduce evidence to prove conduct and speech showing a diseased mental condition, still the presumption of sanity cannot be overcome by the introduction of testimony wholly incompetent and irrelevant upon any issue except that of insanity, without first making it appear to the court, in an offer of proof or statement of counsel that the purpose of such testimony is to rebut the legal presumption of sanity which goes with the state's *prima facie* case of guilt.

5. The court committed no error in instructing upon the law of justifiable and excusable homicide. Not to have done so would not have been error in this case, but in doing so the court only gave to the jury the clearest understanding of the various kinds of homicide recognized by the law. We cannot see how this course could have confused the jury, or been otherwise than favorable to defendant; for it allowed the jury to consider defenses, which, if sustained on any theory, would have been greatly to defendant's advantage.

6. Defendant complains of the following instruction:

"If you find that defendant is guilty of an unlawful homicide, but that the killing was done without malice aforethought, then the defendant would be guilty of the crime of manslaughter as defined in these instructions; and in this connection you are instructed that 'heat of passion,' as used in that definition and in these instructions, means a condition of quick anger or sudden injury engendered by some real or supposed grievance suffered at the time, and amounting to a temporary dethronement of reason, which must be sufficient to rouse an irresistible and uncontrollable passion in a reasonable person; and, in order to reduce an unlawful homicide from murder to manslaughter, the killing must be done upon the instant,—that is, at the time the provocation is given, and under the influence of it, before the blood has had time to cool, and before the mind has had time to consider the character and gravity of the act about to be done, and not from

hatred or pre-existing revenge. And you are instructed that no provocation by words only, however opprobrious or threatening, will mitigate an intentional homicide so as to reduce it to manslaughter. And it cannot be urged that the homicide was manslaughter if you find it was committed in an unreasonable fit of passion. The law makes the offense manslaughter when it is committed under the influence of passion caused by an insult or provocation sufficient to excite an irresistible passion in a reasonable person. If the defendant was so far in possession of his mental faculties as to be capable of knowing that the act of killing was wrong, any mental defect which might cause him to more readily give way to passion than a man ordinarily reasonable cannot be considered by you in this connection. To reduce the offense to manslaughter, the provocation must at least be such as would stir the resentment of a reasonable man."

Part of this instruction is not to be approved of. It is not a very clear definition of heat of passion. (*State v. Sloan*, 22 Mont. 293, 56 Pac. 364.) But in many respects the other portions state rules of law applicable generally to fundamental distinctions between manslaughter and murder. Particular objection is urged to the use of the language which told the jury that, to make the killing manslaughter, it must be done "upon the instant,—that is, at the time the provocation is given, and under the influences of it, before the blood has had time to cool, and before the mind has had time to consider the character and gravity of the act about to be done, and not from hatred or pre-existing revenge." The criticism that this language makes the instruction ambiguous is not well founded. There can be no reasonable misunderstanding of the principle announced by it,—that if a man is so aroused by a sufficient provocation, real or supposed, as to temporarily take away his reason, and he acts under the impulsive influence of the moment by killing a fellow being, he will not be held to account for murder, but that if there is an intervening time, in which his blood may cool, and the mind has had time to consider the fact that he is about to kill a man, and he acts by

killing from hatred and out of revenge, he will be accounted guilty of murder, and not of manslaughter. We believe that to be the correct principle.

It is also said that it was error to say that the homicide would not be manslaughter if it was committed in an unreasonable fit of passion. Nor would it be. If, for example, a man, without provocation of any kind, works himself into a fit of passion over a most trivial affair of life, and in which he does not lose control of his reason, and kills another while in such condition of mind, it is an unreasonable fit of passion, and will not be sufficient to relieve him of guilt of murder. An unreasonable fit of passion is not such a one as a reasonable man under like circumstances would fall into or act under,—it is a condition of anger or passion without reason, whether real or believed to be real, for its existence. Such mental condition has but a remote relation to insanity, which confers irresponsibility; for it is too plain, generally, and was made plain by the instructions in this case, that if the defendant was insane (that is, incapable of distinguishing between right and wrong at the time of, and with respect to, the act which is the subject of inquiry), and if he killed his wife while under an uncontrollable impulse which overrode reason and judgment, or obliterated the sense of right and wrong as to the killing, and deprived the defendant of the power of choosing between them, he was not legally responsible, and must be acquitted. But the impulse of a heat of passion should not be confounded with a generally diseased mind,—the one reduces the grade of crime, thus presupposing some responsibility, while the other presupposes mental incapacity, which exempts the sufferer from criminal punishment altogether. The use of the expression “dethronement of reason,” characterizing the mental condition necessary to be found in order that “heat of passion” exists, if taken by itself, might have been too severe a standard by which to distinguish between murder and manslaughter. (Clarke on Criminal Law, p. 167.) Nor is it necessary to extend the discussion into the somewhat refined distinction of the law of insanity which recognizes that

a man may be impelled by some sort of irresistible power to kill another, knowing what he is doing, and knowing that it is wrong, and of the consequences of the act; for there was no evidence tending to prove that this defendant was in such a condition of mind when he killed his wife. Reverting, then, to the instruction, it is our opinion that the clause which stated that the temporary dethronement of reason must be sufficient to rouse an irresistible and uncontrollable passion in a reasonable person was a qualifying one, specifying the extent to which the dethronement of reason needs only go, and so did away with the possibility of the jury's believing that insanity amounting to a total dethronement of reason must exist, to constitute heat of passion.

Again, the court emphasizes its meaning by subsequently repeating that the law would make the offense manslaughter if committed under the influence of passion caused by an insult or provocation sufficient to excite an irresistible passion in a reasonable person. We therefore believe that there was no misdirection to the jury which was calculated to mislead them in respect to the heat of passion.

The jury was not authorized to find that an irresistible passion might ensue from words of opprobrium, for they had been told that no provocation by words only, however opprobrious or threatening, would mitigate an intentional homicide so as to reduce it to manslaughter. Counsel's error in arguing to the contrary lies in his inattention to the rule that the instructions should be considered and construed together. "A judge is not supposed to give all the law to a jury in one paragraph or in one sentence. If, then, the whole charge, taken together, presents the law applicable to the facts of the case correctly, without contradiction or material omission, it must be held, for all practical purposes, to be correct." (*Terri-
tory v. Hart*, 7 Mont. 489, 17 Pac. 718.)

Objection is made to that sentence of the instruction which told the jury that, if defendant was so far in possession of his mental faculties as to be capable of knowing that the act of killing was wrong, any mental defect that might cause him to

more readily give way to passion, than a man ordinarily reasonable, could not be considered by the jury in this connection. This was, in effect, saying that though a man's mind be defective to an extent that passion easily moves him, and he gives way to it much more easily than a reasonable man ordinarily would, that fact cannot be considered, provided he was sane enough to know that the act of killing was wrong. This is generally correct, with relation to the law of manslaughter, to which it pertained, and in no respect conflicted with the duty of the jury to consider all the evidence before them offered by defendant in support of his plea of insanity, the law of which was elaborately laid down in the charge.

But under no circumstances is appellant in a position to complain of this instruction, inasmuch as he has been convicted of murder in the first degree, and inasmuch as the jury were very fully and expressly charged that, in order to find murder, they must find that malice aforethought existed, while the instruction under discussion was premised upon an hypothesis that the killing was done without malice aforethought, but in the heat of passion. They were told that the presence or absence of malice was to be determined by them in arriving at the nature of the crime, and that, if the act of killing was done with malice aforethought, it was murder; if without malice, it was manslaughter. There was no way, therefore, for them to have found murder in the first degree without first finding malice, deliberate and premeditated, in the killing; and, having found malice aforethought, deliberation upon a lesser crime, which expressly excluded the existence of malice, was immaterial, and could not have drawn them aside from the law pertinent to a malicious killing. A jury in a homicide case will generally advance with intelligence, and step by step, in the consideration of the law given them. In doing this they may go up or down the grades. If they go up, they will be apt to first determine whether the killing was lawful or unlawful, as defined by the statutes and the charge. If lawful, they will go no further; but, if they agree that it was an unlawful killing, they will move up a step, and determine

whether there was an admixture of malice or not. If this is answered "no," manslaughter is the crime to be considered. But, if the result of the deliberations that malice in the killing did exist, then that there has been murder is the conclusion of their finding, and they must follow the law bearing upon a malicious killing, and need not consider that which distinctly eliminates the element of malice, for it no longer has relevancy. Then, having taken up malice in its bearing upon the killing, they will advance to the point of deciding whether the killing was done with or without the deliberation and premeditation necessary to constitute murder in the first degree, as distinguished from murder in the second degree; and so they will move on gradually until they may reach the point where every essential of murder in the first degree is found to exist, and decide that the highest grade of the crime is necessarily established by the evidence. Throughout their deliberations in a case like this there also stands a charge upon the question of insanity, where they are told that their duty is to acquit, if they find the prisoner mentally irresponsible, no matter how shocking the homicide may have been. From all this it seems to follow as an inevitable proposition that where the jury find malice as it has been correctly defined, and where they have been clearly told what murder in its degrees is, what manslaughter is, and that they could find no murder without malice in the killing, the doctrine of error without prejudice obtains, as applied to an obscure definition of one element of the crime of manslaughter,—the heat of passion. Particularly is this true where, as in this case, the evidence proved murder, and not manslaughter. There was no room for a verdict of manslaughter. It was a killing in malice aforethought, or it was the act of an insane man. (*People v. O'Neal*, 67 Cal. 378, 7 Pac. 790; *State v. Talbott*, 73 Mo. 347; *Thompson on Trials*, Sec. 2403; *State v. Ward*, 74 Mo. 253; *State v. Kotovsky*, *Id.* 247; *State v. Ellis*, *Id.* 207; *State v. Erb*, *Id.* 199; *Kerr on Homicide*, p. 578.)

Finally, in the light of the full charge given upon the law of murder and manslaughter, the obscurities in the particular

charge upon an irresistible impulse and heat of passion were not prejudicial to the rights of the defendant, and the instruction complained of is not a sufficient ground for reversal of the judgment.

7. Newly discovered evidence was also a ground for asking a new trial. This point is easily disposed of by saying that the facts which defendant wished to prove by his newly discovered evidence were cumulative, tending to prove the allegation of mental incapacity which became an issue on the trial, and in support of which defendant had called witnesses who testified, and were not such as to make it clearly probable that a different result would follow another trial, nor did it appear that the testimony could not have been produced upon the former trial by the exercise of reasonable diligence. In *People v. Demasters*, 109 Cal. 607, 42 Pac. 236, the court well said: "We can see no abuse of discretion on the part of the court below in denying defendant's motion for a new trial, made upon the ground of newly discovered evidence. As has been repeatedly held by this court, a motion for a new trial is addressed to the sound legal discretion of the trial court; and the action of the latter will not be disturbed, except in an instance manifesting a clear and unmistakable abuse of such discretion. This rule is peculiarly applicable to an application based upon the ground of newly discovered evidence, which not only involves an enlarged discretion in the trial court, but has never been looked upon with favor, but rather with distrust. (*Hobler v. Cole*, 49 Cal. 250; *Arnold v. Skaggs*, 35 Cal. 684.) To entitle the plaintiff to a new trial on this ground it must appear, among other things, that the new evidence be not cumulative merely; that it be such as to render a different verdict reasonably probable upon a retrial; and that the evidence could not with reasonable diligence have been discovered and produced at the trial. 1 Hayne on New Trials and Appeals, Sec. 88."

8. Misconduct of the jury is also complained of. It appears by the affidavit of A. G. Redding, foreman of the jury: That after the jury retired he was selected as foreman,

whereupon the jury proceeded to take an informal ballot, "but that before the said ballot was taken one of the twelve jurors then and there being in the jury room suggested that 'whatever two-thirds of the vote shows, that shall be the verdict.' That this deponent demurred to the suggestion of this juror, whose name this deponent does not remember, and that affiant then and there stated 'that the verdict must be unanimous; all the jurors must agree.' After this, and before the ballot was taken, this said juror again stated 'that he was willing that a majority should rule.' That thereafter this said jury took this said informal ballot, which said ballot resulted as follows: Ten ballots for murder of the first degree, one ballot for murder of the second degree and one ballot for manslaughter. That shortly thereafter the jury took a ballot upon the merits of the case, which resulted as follows: Eleven for murder of the first degree and one ballot in these words, 'Murder degree;' and this deponent says that this said ballot was passed as no ballot, and thereafter the jury took another ballot which resulted as follows: Twelve for murder of the first degree. And further the deponent sayeth not."

Passing the proposition that, on grounds of public policy, a juror will not be allowed to impeach a verdict upon the ground stated in the affidavit quoted, we agree that the juror who said that he was willing that a majority should rule may not have had that deep sense of responsibility devolving upon him which every man ought to possess and feel when he weighs evidence and helps to determine the question of life or liberty of his fellow man. But the remark may have been mere idle speech, and presumably it was; for the jury were told that their verdict must be unanimous, and, upon a poll had after it was read in court, each answered that the verdict rendered was his true verdict. This Court cannot indulge in the presumption that a juror violated his oath to render a true verdict according to the evidence, by yielding his convictions to those of a majority of his fellows merely because they outnumbered him. Every fair presumption is

to the contrary, and we decline to hold otherwise. (*State v. Harper*, 101 N. C. 761, 7 S. E. 730.)

9. The court charged that upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon the defendant, unless the proof on the part of the prosecution tends to show that the crime only amounts to manslaughter, or that the defendant was justifiable or excusable. The instruction is the law as laid down by section 2081 of the Penal Code, and was proper to be given in this case. The defendant, however, ought not to complain of the refusal to instruct, in connection with this particular charge, that defendant should be acquitted if a fair preponderance of the evidence showed his insanity when the crime was committed; for the better-considered rule is that, to entitle a defendant to an acquittal on the ground of insanity, he is not required to overcome the presumption of sanity by a fair preponderance of the evidence, or any greater amount of evidence than enough to raise a reasonable doubt whether at the time of the killing he was "mentally competent to distinguish between right and wrong, or to understand the nature of the act he was committing." In the recent case of *Davis v. U. S.*, 160 U. S. 469, 16 Sup. Ct. 353, the supreme court review the authorities upon the question of where the "burden of proof" lies in criminal cases where insanity is relied upon as a defense, and Justice Harlan says:

"Strictly speaking, the 'burden of proof,' as those words are understood in criminal law, is never upon the accused to establish his innocence, or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial, and applies to every element necessary to constitute the crime. Giving to the prosecution, where the defense is insanity, the benefit in the way of proof of the presumption in favor of sanity, the vital question from the time a plea of not guilty is entered until the return of the verdict, is whether, upon all the evidence, by whatever side adduced, guilt is established beyond

reasonable doubt. If the whole evidence, including that supplied by the presumption of sanity, does not exclude beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offense charged. His guilt cannot be said to have been proved beyond a reasonable doubt, his will and his acts cannot be held to have joined in perpetrating the murder charged, if the jury, upon all the evidence, have a reasonable doubt whether he was legally capable of committing crime, or (which is the same thing) whether he willfully, deliberately, unlawfully, and of malice aforethought took the life of the deceased. As the crime of murder involves sufficient capacity to distinguish between right and wrong, the legal interpretation of every verdict of guilty as charged is that the jury believed from all the evidence, beyond a reasonable doubt, that the accused was guilty, and was therefore responsible criminally for his acts. How, then, upon principle or consistently with humanity, can a verdict of guilty be properly returned, if the jury entertain a reasonable doubt as to the existence of a fact which is essential to guilt, namely, the capacity, in law, of the accused to commit that crime?"

The learned judge sums up the discussion by approving of a part of the celebrated charge of Justice Cox in the *Guiteau Case*, 10 Fed. 161, where it was said:

"The crime, then, involves three elements, viz: The killing, malice, and a responsible mind in the murderer. But, after all the evidence is in, if the jury, while bearing in mind both these presumptions that I have mentioned (i. e. that the defendant is innocent until he is proved guilty, and that he is and was sane, unless evidence to the contrary appears), and considering the whole evidence in the case, still entertain what is called a 'reasonable doubt,' on any ground (either as to the killing or the responsible condition of mind), whether he is guilty of the crime of murder, as it has been explained and defined, then the rule is that the defendant is entitled to the benefit of that doubt, and to an acquittal."

The true principle, therefore, is that the state must prove

guilt beyond a reasonable doubt, and if, upon the whole evidence, no matter whether the state or defendant offers such evidence, the jury have a reasonable doubt whether, when defendant killed the deceased, he was sane or insane, it is their duty to give the defendant the benefit of the doubt and to acquit him. And upon this theory the judge charged—hence he was right in refusing the instruction offered.

We find no error in the record, and must affirm the judgment and order appealed from.

Affirmed.

FRANKLIN, APPELLANT, v. SCHULTZ ET AL.,
RESPONDENTS.

[No. 1,182.]

[Submitted July 6, 1899. Decided July 17, 1899.]

23	165
27	55
27	59

Building Contract—Construction—Performance—Acceptance of Building—Waiver of Compliance with Terms of Contract.

1. Under a building contract providing that final payment should be made only upon the production of satisfactory proof that there were no claims or liens against the building, the performance of the condition is precedent to the right of payment.
2. There is not a substantial performance of a building contract entitling the builder to recovery of the final payment, where there was a failure to plaster a portion of the house and build a flue provided for in the contract.
3. That the owner of a newly-constructed building refusing to accept the same because not completed according to contract moves into the building will not operate as a waiver of defects and acceptance.
4. An intention to waive defects in the construction of a building, and accept same as a compliance with the contract by payment of a portion of the final installment on the contract, will not be inferred, where it is not shown that payment was made with knowledge of the defects.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

ACTION by J. Franklin against Mary Schultz and Carl Schultz. Judgment for defendants, and plaintiff appeals. Affirmed.

Messrs. Bender & Alley, for Appellant.

The defendants, by accepting the building and taking possession of the same and making a part of the last payment, which by the terms of the contract was to be made upon the full completion of the building, waived any further compliance of the terms of the contract on the part of the plaintiff. (*Bell v. Teague*, 3 South. (Ala.) 861; *Giant Powder Co. v. San Diego Flume Co.*, 25 Pac. (Cal.) 976; *Rice et al. v. Brown*, 42 Pac. (Kas.) 396; *Montandon v. Deas*, 14 Ala. 45; *Heckmann v. Pinkney*, 81 N. Y. 211; *Johnson v. D'Peyster*, 50 N. Y. 666; *Glacius v. Black*, 50 N. Y. 145; *Phillips v. Gallant*, 62 N. Y. 256; *Dillon v. Masterton*, 7 Jones & S. 133; *Sohns v. Murphy*, 46 N. E. (Ill.) 52.)

Messrs. Toole, Bach & Toole, for Respondents.

MR. JUSTICE PIGOTT delivered the opinion of the court.

This action was brought to recover of the defendants the sum of \$497.75, claimed to be the balance due to the plaintiff upon a building contract whereby plaintiff undertook to erect and complete for the defendants, on a lot owned by them in Butte, a two-story and basement brick house in accordance with the plans and specifications, and for which the defendants promised to pay to plaintiff \$2,950. Enforcement of a mechanic's and material man's lien for the alleged balance was also sought. At the conclusion of the evidence in behalf of the plaintiff, the court, trying the cause without a jury, ordered judgment for the defendants, and the plaintiff appeals.

The contract provides that all the work shall be done and the building completed in accordance with the plans and specifications, and that the defendants shall make payments from time to time during the progress of the work, the final payment of \$1,350 to be made "when the said building is finally completed and accepted by the said second parties, and the said second parties are furnished with satisfactory proof that all claims against the said building have been paid by the said first party, and that no liens exist on the said property for or on account of the work done thereon or the material furnished

in the erection of the same." One of the specifications requires plastering, without reference to any particular story or room, and without exception or exclusion of any particular portion of the building. The plans call for a chimney flue in the east half of the basement.

In the complaint it is alleged that the plaintiff completed the building under, and in all respects fully complied with and performed all the conditions of, the contract. These allegations the defendants, by their answer, denied. The evidence failed to show that the defendants had been furnished with proof "that all claims against the said building" had been paid, or that no liens for work or materials existed. Although the plaintiff by deposition testified generally, without descending to details, that he completed the building as provided for in the contract, yet his witnesses made it appear, and clearly, that the east room of the basement, an apartment some 31 feet long by 12 or 13 feet wide, adjoining the dining room and kitchen, which comprise the western part of the basement, was never plastered, and that no flue was ever built in that room. There was no evidence whatever tending to disclose an understanding of the parties, or in respect of the uses intended to be made of this room, from which the inference that it need not be plastered appeared or could be deduced. No effort was made by the plaintiff to show that the particulars in which the contract had not been performed were unimportant, or that the nonperformance was the result of mere oversight; nor what the cost of remedying the defects or deviations would be. The plaintiff informed the defendants that the building was completed according to the plans and specifications, and offered it to them for their acceptance; but they refused to accept it. The plaintiff then locked up the house, and refused to turn it over to the defendants, for the reason that the last payment had not been made; whereupon they entered the house from the second-story window, and asked the plaintiff for the keys. He told them that he would deliver the keys upon their making the final payment. This the defendants refused to do; but had keys made, opened the doors, and took possession of the house.

1. No error was committed in ordering judgment for the defendants. The contract specifies the event upon the happening of which, and of others, the last payment should be made, namely, the production of satisfactory proof that there were no claims or liens against the building. This provision is reasonable, and one which, in view of the statutes of Montana permitting direct liens to be filed by subcontractors, ordinary prudence would suggest for the protection of the owner of the property about to be improved. The performance of this condition, or its waiver, is precedent to the right of payment,—the final installment will not mature until the condition shall have been performed.

2. This is not an action to recover what the services and materials were reasonably worth. It is to recover the agreed price fixed by an express contract in writing. The evidence does not tend to prove a substantial performance by the plaintiff of the contract; nor, under the circumstances, can it successfully be maintained that the failure to plaster, or the omission to build the flue, was unintentional or a mere oversight. The plaintiff may lawfully insist upon payment only when the conditions on which payment is due have been performed. "While slight and insignificant imperfections or deviations may be overlooked on the principle of '*De minimis non curat lex*,' the contract in other respects must be performed according to its terms. When the refusal to proceed is willful, the difference between substantial and literal performance is bounded by the line of *de minimis*. * * * Substantial performance is not sufficient, except when it is understood as excluding only such unsubstantial differences as the parties are presumed not to have had in contemplation when they made the contract." (*Van Clief v. Van Vechten*, 130 N. Y. 571, 29 N. E. 1017.)

But it is argued that the defendants, by taking possession of the building, waived any further compliance on the part of the plaintiff with the terms of the contract. We think, however, there was not sufficient proof of a waiver or of an acceptance of the building, as in compliance with the contract,

to have justified the court in deciding the cause for the plaintiff. The doctrine applicable to this subject finds clear expression in the opinion of Judge Comstock, in the leading case of *Smith v. Brady*, 17 N. Y. 173, approved in *Van Clief v. Van Vechten*, *supra*. That able judge said:

“The owner of the soil is always in possession. The builder has a right to enter only for the special purpose of performing his contract. Each material as it is placed in the work becomes annexed to the soil, and thereby the property of the owner. The builder would have no right to remove the brick or stone or lumber after annexation, even if the employer should unjustifiably refuse to allow him to proceed with the work. The owner, from the nature and necessity of the case, takes the benefit of part performance and, therefore, by merely so doing, does not necessarily waive anything contained in the contract. To impute to him a voluntary waiver of conditions precedent from the mere use and occupation of the building erected, unattended by other circumstances, is unreasonable and illogical, because he is not in a situation to elect whether he will or will not accept the benefit of an imperfect performance. To be enabled to stand upon the contract, he cannot reasonably be required to tear down and destroy the edifice if he prefers it to remain. As the erection is his by annexation to the soil, he may suffer it to stand, and there is no rule of law against his using it without prejudice to his rights. * * * We only say that, according to the settled law in this state, the plaintiff cannot recover the payments which by the terms or true construction of the contract are due only on condition of performance by him, unless he can show such performance, or prove that it has been waived. And the law does not adjudge that a mere silent occupation of the building by the owner amounts to a waiver; nor does it deny to him the right so to occupy, and still insist upon the contract. The question of waiver of the condition precedent will always be one of intention, to be arrived at from all the circumstances, including the occupancy. To conclude, there is, in a just view of the question, no hardship

in requiring builders, like all other men, to perform their contracts, in order to entitle themselves to payment, where the employer has agreed to pay only on that condition. It is true that such contracts embrace a variety of particulars, and that slight omissions and inadvertences may sometimes very innocently occur. These should be indulgently regarded, and they will be so regarded by courts and juries. But there can be no injustice in imputing to the contractor a knowledge of what his contract requires, nor in holding him to a substantial performance. If he has stipulated for walls of a given material, and with a hard inside finish, he knows what he is to do, and must perform it. If he has engaged for a given number and size of windows, joist, beams, and sills, he cannot, with the specifications before him, innocently depart from his contract. If he fails to perform when the requirement is plain, and when he can perform if he will, he has no right to call upon the courts to make a new contract for him; nor ought he to complain if the law leaves him without remedy." *Anderson v. Todd* (N. D.), 77 N. W. 599, also contains a valuable and instructive discussion of the questions presented in the case at bar.

It does not appear that the defendants paid any part of the last installment of the agreed price with knowledge of the plaintiff's failure to comply with the terms of the contract under which the work was to be done.

The judgment is affirmed. Let remittitur issue forthwith.

Affirmed.

STATE EX REL. COAD, RELATOR, v. JUDGE OF THE
NINTH JUDICIAL DISTRICT COURT, RESPONDENT.

[No. 1,406.]

[Submitted June 26, 1899. Decided July 24, 1899.]

23	171
31	446
23	171
36	421

*Mandamus—Disobedience to the Command of the Writ—
Contempt.*

1. Where a court has jurisdiction of an application for *mandamus*, and authority to determine all questions presented by the application, the fact that it granted the relator more comprehensive relief than was warranted by the application is not a defense in contempt proceedings for failure to obey the mandate,—at least, so far as it related to matters contemplated by the application.
2. Section 230 of the Penal Code refers to mutilating, defacing, or altering books, maps, and other documents which are matters of evidence, and has no reference to the making of a correct index of the contents of any books in a public office.
3. It is the duty of one to obey a writ of mandate, at all hazards, until the judgment awarding it can be reviewed and annulled on appeal.

Certiorari, on the relation of B. S. Coad, to review a judgment of the judge of the Ninth Judicial district adjudging relator guilty of contempt. Affirmed.

Messrs. Sanders & Sanders, and *Mr. E. H. Goodman*, for Petitioner.

Mr. J. E. Kanouse, and *Mr. E. A. Carleton*, for Defendant.

PER CURIAM.—Original application for a writ of *certiorari* to annul a judgment imposing a fine and costs upon the relator for failure to obey a peremptory writ of *mandamus*, and directing his imprisonment until he should obey the writ. The writ of *mandamus* was issued in the case of *State ex rel. Lambert v. Coad*, 23 Mont. 131, 57 Pac. 1092. In the statement preceding the opinion in that case will be found a history of the proceedings down to the entering of the judgment on March 13, 1899. The judgment therein directed the peremptory writ to issue, commanding B. S. Coad, the relator, as clerk of Broadwater county, to “allow the relator herein,

George Lambert, and G. R. McDonald to have access at all reasonable hours to the public records of said Broadwater county, for the purpose of indexing the same." From the proceedings certified to us herein it appears that the writ was issued in accordance with this judgment, and thereafter, upon April 21, served upon B. S. Coad by the sheriff of Broadwater county. Lambert thereupon proceeded to the office of Coad, and demanded of him access to the public records of the county, such as would be necessary to enable him to proceed with the indexing of the transcribed records pursuant to his contract entered into with the board of commissioners on January 11, 1899. This right of access to the records was permitted by Coad, but the right to make entries in the index books, theretofore bought by the board and used for the purpose of indexing the transcribed records, was refused. Lambert was informed by Coad that he could do all the indexing he desired to do, but that he must not make any entry nor do any writing in any of the books belonging to the office. On April 26th these facts were made to appear to the Honorable F. K. Armstrong, judge of that district, by the affidavit of Lambert. This affidavit sets forth particularly the history of the proceedings which resulted in the judgment directing the peremptory writ of mandate to issue, and the action of Coad under the mandate of the writ. Thereupon an order was made by the said judge requiring Coad to appear before him at Bozeman, Gallatin county, on May 3d, and to show cause why he should not be punished for disobeying the writ. Coad at the hearing filed his affidavit, setting forth that he had complied with the command of the writ in other respects, but that he had refused Lambert permission to write or make entries in any of the index books in his custody and control as the clerk of the county, as in the faithful performance of his duty as such officer he was bound to do. Coad was thereupon found guilty of willful disobedience to the command of the writ, and sentenced to pay a fine of \$5, with costs of the proceeding, and committed to the county jail of Broadwater county until he should obey the writ. By reference to *State*

ex rel. Lambert v. Coad, ante p. 131, it will be observed that the original application for the writ of *mandamus* was by Lambert in his own behalf. The extent of the relief sought by him was access to the public records of Broadwater county for the purpose of indexing that portion of the transcribed records still remaining to be done. The relief granted by the writ was beyond that contemplated by the application in two particulars, viz: In commanding Coad, as clerk, to allow McDonald, as well as Lambert, access to the records, and in commanding him to allow McDonald and Lambert to index these records generally; not expressly limiting them to the exercise of their rights under their contract to index the transcribed records not yet indexed. No complaint is made that the judgment was in excess of jurisdiction because it included McDonald as well as Lambert. This feature of the judgment is not mentioned in the affidavit, nor do counsel refer to it.

The contention made by counsel for relator is that the district judge so far exceeded his jurisdiction in granting Lambert the right to index the records generally, without expressly limiting his rights to the indexing of the transcribed records as contemplated by the terms of his contract, that the judgment is void. Counsel also insist that the district judge directed the relator to permit Lambert and McDonald to do what it is unlawful for him to permit any one to do in his office; that is, to take charge of the records of his office, with liberty to do the indexing generally. This, it is insisted, was to command relator, not only to violate his oath of office, but also to do what would render him liable to prosecution for a felony, under Section 230 of the Penal Code, which forbids a public officer to mutilate, deface, or alter any public record in his custody, or to permit another to do so. On these two grounds it is claimed that the judgment finding the relator guilty of contempt should be annulled.

The district judge had jurisdiction to try and determine all questions presented by the application for the writ of *mandamus*. It cannot be denied that if the board of commission-

ers had obeyed the law, and let the contract for indexing the transcribed records to the lowest bidder, the writ of mandate would have been properly issued. Whether they did so comply with the law, and make a valid contract, or whether the contract made was valid in the absence of a compliance with the provisions of the statute, were questions within the jurisdiction of the district judge. The defendant was properly before him under the direction of the alternative writ. The judge had power to decide the questions involved, wrong as well as right. (*State ex rel. Buck v. Board of Commissioners of Ravalli County*, 21 Mont. 469, 54 Pac. 939.) The fact that he did decide that there was a contract when there was none, as is held in *State ex rel. Lambert v. Coad, supra*, was error on his part, but not want of jurisdiction. The district judge therefore had jurisdiction to pronounce the judgment in that proceeding, and award the writ.

Was the district judge's action void because in pronouncing judgment he made it more comprehensive in the particulars mentioned than the application justified? The language of the command of the writ is, "To allow the relator herein, George Lambert, and G. R. McDonald, to have access at all reasonable hours to the public records of said Broadwater county for the purpose of indexing the same." In so far as McDonald is concerned, the judgment is void. He is not in position to claim any rights under it. He occupies the position of a stranger to the record, being neither relator nor defendant. (*Freeman on Judgments*, Sec. 120.) But it does not follow that the judgment was void because it is more comprehensive in other respects than the application warranted. "If the court has jurisdiction of the action and the parties, and is competent to give part of the relief granted, its judgment, so far as within its powers, is valid." (*Id.*; *Koepke v. Dyer*, 80 Mich. 311, 45 N. W. 143; *ex parte Rowland*, 104 U. S. 604.) There is no question but that the judgment of the district court should have stated particularly the act required of the clerk of Broadwater county, but the relief granted clearly included what it was intended to command

him to do, and the record here discloses that both he and Lambert clearly understood what was required. The affidavit of Lambert filed in the contempt proceeding, and the answer of Coad to the citation, clearly show that the controversy was as to the right of Lambert to use the index books in the office in completing the indexing of the transcribed records, and no others. It was not claimed by Lambert that he had any right to perform any duty appertaining to the clerk, nor that he had any other right than to make entries in the index books bought by the commissioners to be used in the indexing the transcribed records. Coad was not put in such position by the judgment that he would have committed any crime in permitting Lambert to enjoy all the rights he claimed under it. Coad does not dispute the right of the board to make arrangements to index the transcribed records. He simply disputes the right of the board to hire Lambert to make entries in the index books bought for this express purpose; and this upon the technical ground that, if he should permit Lambert to do so, it would render him liable to prosecution for a crime. The books in controversy, so far as can be judged from the record here, were not a part of the records of the county. It appears that they had never been used for any other purpose than to index the transcribed records that were still incomplete. Under the statute (Sess. Laws 1897, p. 48, Sec. 12), they would become a part of the public records only upon their completion under the contract let by authority of the board. The section of the Penal Code (Section 230) under which Coad claims he would be liable to prosecution for allowing Lambert to make entries in the index books has no application. It refers to mutilating, defacing, or altering books, maps, and other documents which are matters of evidence, and has no reference to the making of a correct index of the contents of any books in the office. And we apprehend that if a stranger should correctly index a paper or record in the proper book, either by permission of the clerk or without it, in either case neither he nor the clerk would be guilty of any crime. The whole proceeding on the

part of the clerk reveals a disposition by subterfuge to avoid obedience to the writ. It would be proper for him to complain of the judgment when an attempt was made to use it to his prejudice in the performance of his official duties—until then, it does not lie in his mouth to complain. It was his duty to obey the writ, at all hazards, until the judgment awarding it could be reviewed and annulled on appeal. (High, Extr. Leg. Rem. Secs. 567, 568; *Kaye v. Kean*, 18 B. Mon. 839; *State v. Elkinton*, 1 Vroom, 30 N. J. Law 335; Merrill on Mandamus, Sec. 302.) Instead of doing this, he refused to obey it, by interpreting the judgment as too comprehensive, and that, too, in a particular entirely immaterial, so far as he was concerned, while fully understanding that he would suffer no prejudice by obeying it, and while no claim was sought to be enforced under it but such as was lawful. There was no excuse for this conduct on his part, and the district judge was clearly within the proper exercise of his power in punishing his disobedience.

We apprehend that the district judge will not, now that the judgment awarding the writ of *mandamus* has been reversed and annulled, undertake to enforce it by imprisoning the relator; but his action in punishing the relator by the imposition of a fine and costs in the contempt proceeding was proper, and will be affirmed, and the judgment therein may be enforced to the extent of requiring the fine and costs to be paid.

Affirmed.

BUTTE & BOSTON MINING CO., APPELLANT, v. SOCIETE
ANONYME DES MINES DE LEXING-
TON, RESPONDENT.

[No. 1,080.]

[Submitted April 11, 1899. Decided July 24, 1899.]

*Mines and Mining Claims—Extralateral Rights—Continuity
and Identity of Veins—Instructions—Appeal—New Trial.*

1. In order that a vein may be followed extralaterally, identity throughout is essential, and the vein must be continuous; but the continuity may be interrupted, provided the interruption does not prevent the tracing of the vein through the fissure as geologically identical.

Obiter: It is a question of fact, to be decided by the jury subject to general rules, whether there is that essential identity and continuity by which the vein can be traced through the surrounding rocks.

2. Where the court, in a charge, has correctly defined a vein, and indicated that, in order that a vein may be followed extralaterally, it must be the identical vein throughout, it is not error to place stress on the physical continuity, and to neglect to charge as fully in regard to the other elements of identity, when no charge is requested.
3. A charge that veins are permanently separated, and cannot be followed as the same vein, when, in order to connect them, it is necessary to pass through a considerable distance of rock showing no elements of a vein, where there are neither minerals, walls, nor seams, is not erroneous, as being practically a charge that the jury must reach a certain conclusion as to the continuity of the vein.

Obiter: It is the right of a jury to draw their own conclusions of fact from the evidence, and the court must avoid language which "virtually" decides facts, and withdraws their determination from the consideration of the jury.

4. In a charge that, if no evidence of a vein appear for any considerable distance, the veins are not identical, the use of the word "considerable" is not objectionable as being indefinite.
5. The court in its instructions should not assume the existence of a fact in controversy.
6. *Quere:* Whether, under the conditions as presented herein, the purchaser of a portion of a mining claim must follow along a plane of the end line of the claim drawn down at the point of departure of the vein from the conveyed premises, or must follow the plane of the end line of the conveyed premises which may cross the vein.
7. Where the court sustained a motion for a new trial, and did not expressly exclude the ground that the verdict was against the evidence, the ruling will be sustained on appeal, where there appears to be a conflict of evidence.

Appeal from District Court, Silver Bow County; John J. McHatton, Judge.

ACTION by the Butte & Boston Mining Company against the

23	177
126	189
23	177
227	320
23	177
28	48
28	506
23	177
31	335
23	177
41	389
41	439

Societe Anonyme des Mines de Lexington. From an order granting a new trial after a judgment for plaintiff, it appeals. Affirmed.

Mr. John F. Forbis, and *Mr. Louis Marshall*, for Appellant.

In granting a new trial upon errors and instructions Nos. 9, 10, and 11, which are treated together, the lower court seemed to think that such instructions were erroneous; in the first place because they laid down the rule that continuity and not identity of a vein is the test of the right to follow the vein from one's ground under that of another, and secondly, that these instructions infringed the right of the jury by discussing the evidence.

Upon the first question, we do not think, either identity or continuity the sole test of the right to pursue the vein on its dip. The vein might be apparently continuous and yet it might be proved to a mathematical certainty that it was not throughout one identical vein. Faults or slips might set one part of one vein so near another vein that they would be practically continuous, and yet we should not think that one would be allowed to follow one to its termination, and then continue upon the other, provided, a lack of identity was clearly established.

In the next place, identity in itself will not constitute the right to follow a vein wherever it may go. As long as the vein is absolutely continuous there is no question as to the right to pursue it on its dip, even though it may vary in size and in richness or the character of its filling. But when the vein is once intercepted and its parts separated, then there comes a nice question as to how much separation will constitute a lack of continuity. In many cases veins have been broken by faults, and the upper part carried downward, and subsequently erosions have exposed an apex for the lower part of the vein. Under such circumstances we have two apexes to different parts of the same identical vein. When we undertake to follow down upon the faulted part we find

that it has no continuity but stops abruptly when it comes to the fault line, whereas the bottom of the vein proceeds down regularly and is uninterrupted by that particular fault or slip. Now it is possible that a location, and a valid location, may be made upon either of these apexes or veins. It may be proved conclusively to a geological mind that they are or were identical. We do not suspect that any court would hold that on account of their identity a locator of one could claim the other by reason of their identity.

It often happens, also, that slips in the earth's crust separate the parts of a vein to a great distance, so far, indeed, that a great deal of development is necessary to prove the identity, and without which development the identity would not be suspected. Under such circumstances it seems to us illogical to hold that he who has located a fragment of a vein—the top is generally a fragment—can pass into the possessions of another and take the substantial part of the vein, by simply proving the identity.

Usually if we find the veins continuous, or nearly so, in their downward course, we very naturally conclude that the vein is not only continuous, but identical, and the miner is not questioned closely as to identity so long as he has continuity. By the word continuity we do not mean to be understood as claiming that the vein must be absolutely continuous without a break or that the walls of the vein must at all places match exactly. By following the fault line upwards, if work is done upon the upper part of the vein, it is usually very easy to trace the connection between the two parts of the vein. In and along this fault line there is usually that character of material called drag, which is identical with the character of material in the vein at the point of its interruption. Usually the distance to be followed along this fault line is very short and the miner has no difficulty whatever in going from one part of the vein to the other, and identifying his property, and at the same time having what may be called a continuous vein. In such matters we quite agree that the question is one for the jury, under proper instructions of the court.

But we submit that without continuity, geological or otherwise there is absolutely no extra lateral right. Continuity may not be the only test of identity, but it is the only test of the right to pursue veins on their dips, and that continuity must be determined by the facts in each case, and those facts should be submitted to a jury, or to the court, if the case be tried without a jury.

Our contention then is, that there must be both identity and practical continuity. Eliminate either of these characteristics and the right to follow the vein is lost. Where the question of continuity is in doubt, identity goes a long ways to establish it, but under any and all circumstances, in order to establish the right to pursue the vein on its dip there must be both identity and continuity.

The instructions complained of are taken almost bodily from the decisions of the Supreme Court of the United States; *Iron Silver Mining Co. v. Cheesman*, 116 U. S. 529. The lower court insists that these instructions, although they may be correct, were given under different conditions than arise in the case at bar. We cannot understand the point of the lower court in that respect, for a consideration of the case will show that both turn upon the questions of identity and continuity. The question in both cases was whether the party might follow a vein in his ground into that of another, and the almost identical words used in the instructions in this case were used in the instructions in the case in the Supreme Court of the United States. In fact, the instructions in this case were copied from the instructions in that, with such alteration as was necessary to fit the case. Therefore we see no reason why the instructions, if correct in one case, should not be given in another of like character. (Eureka case, 4 Sawyer 302, 311; *Cheesman v. Shreve*, 40 Fed. 787; *Stevens v. Williams*, 1 M. R. 557; *Leadville Min. Co. v. Fitzgerald*, 4 M. R. 380-387; *Iron Silver Min. Co. v. Cheesman*, 9 M. R. 552; *Hyman v. Wheeler*, 29 Fed. 347, 15 M. R. 519; 2 Lindley on Mines, Sec. 615, see also Sec. 866, p. 1123; *Iron Silver Min. Co. v. Mike & Starr Co.*, 143 U. S. 404; *Barringer and*

Adams on Mines and Mining, 438; *Iron Silver Min. Co. v. Murphy*, 3 Fed. 368, 1 M. R. 584.)

There are two reasons why the court should not have granted a new trial upon Instruction No. 19: First, because it correctly stated the law; and, secondly, because if erroneous, it could have had no effect upon the verdict.

1. It will be observed that this instruction refers to the right to follow upon the dip of a vein along a plane drawn through the end line of the conveyed property. The question before the court was whether the party should follow along a plane of the end line of the claim, drawn at the point of departure of the vein from the conveyed premises, or whether he should follow the plane of the line of the conveyed premises, which crosses the vein.

When we submitted this instruction to the court we were very doubtful as to its correctness, and were much surprised when it was given. But the question being an open one, could not be preserved in any other way but by asking the court to instruct the jury as it did in this instruction. We have never believed the doctrine announced in the instruction to be a correct one. It has always been our view that the end line of a claim should determine the dip of the vein taken at any point along the vein, and that when one purchased a portion of a claim, that he acquired only so much of a vein on its dip as he has apex at the surface, and that the dip of a vein is to be determined by the course of the true end lines of the claim.

However, recently, the judge who reversed the present case, acting as an attorney in another case, insisted upon a different ruling, and thereupon procured a Federal judge to render a decision upholding the correctness of Instruction No. 19, given in this case. If that opinion is correct, Instruction No. 19 correctly states the law. We submit the matter to the court as to which view of the law is correct. (*Boston & Montana Con. C. & S. M. Co. v. Montana O. P. Co.*, 89 Fed. 529.)

2. Under no circumstances should the court have ordered

a new trial upon Instruction No. 19, whether erroneous or not. The instruction was important only in event that the apex of the vein in question should be found within defendant's ground. There was a divergence of the two lines in question, which left a small wedge of ground, which, under Instruction No. 19, would belong to the plaintiff, whether the apex was north or south of the dividing line between the parties.

The jury, however, found that the vein was entirely south of the dividing line, and consequently all belonged to the plaintiff. Therefore, the entire importance of this instruction was destroyed by a finding of the jury. If the correct instruction, assuming No. 19 to be incorrect, had been given, the same result would have followed. (Hayne on New Trials and Appeals, Sec. 286; *Fort Scott W. & W. Ry. Co. v. Jones*, 28 Pac. Rep. 978, S. C. 48, Kans. 51; *Clark v. Lockwood*, 21 Cal. 221, 222; *Lafontaine v. Green*, 17 Cal. 294; *Atchison T. & S. F. Ry. Co. v. English*, 38 Kans. 110; *City of Kinsley v. Morse*, 40 Kans. 577; *Ellwanger v. Fish*, 60 N. Y. 651.)

Mr. W. W. Dixon and Mr. John W. Cotter, for Respondent.

The first error alleged by appellant is that the court, in granting the motion for a new trial, held that instructions Nos. IX, X and XI, which were properly treated together, did not correctly state the law, and were erroneous.

Respondent does not here care to dispute or question the definition of a vein or a lode given in these instructions. The definitions given by Mr. Justice Field and Judge Hallett have frequently been approved as correct in relation to the facts in the particular cases to which they were applied. But it may be noted, in the case of *Iron Silver Mining Company v. Cheesman*, 116 U. S. 529, so much relied upon by appellant, that the Supreme Court of the United States used, on page 533, the following language:

“What constitutes a lode or vein of mineral matter has been

no easy thing to define. In this court no clear definition has been given. On the circuit it has been often attempted."

Nor, so far as respondent is aware, has the Supreme Court of the United States yet attempted to give a general and comprehensive definition of what constitutes a lode or a vein.

In instructions numbers IX, X and XI, now under consideration, it will be noticed that the question of continuity is made the sole and exclusive test of the right to pursue the vein on its dip, while the question of identity, which, we claim, is of infinitely more importance, is entirely ignored.

The question in dispute in this case was a plain one. Was the apex of the vein from which defendant took the ore in controversy within the surface boundaries of the portion of the Wappelo Lode Claim owned by the defendant, or within the surface boundaries of the portion of the same owned by the plaintiff? In other words, was the vein from which the ore was extracted identical with and the same vein, the top or apex of which was found in defendant's ground, or was it the same vein and identical with any vein, the top or apex of which was within plaintiff's ground?

The court below, in the instructions under consideration, lays no stress whatever upon identity as a necessary element in the right to follow a vein on the dip. It uses repeatedly the word "continuity," and gives that as being the only test of a right to follow a vein. The words used are "continuity" and "continuous." According to these instructions, if the continuity was broken, no matter for how small a distance, the right to follow the vein was lost. Continuity was made the sole and only test of this right. Indeed, so far did the Court go, in these instructions, that he told the jury, in instruction number XI, that "if it becomes necessary in order to connect two separate and distinct portions of a vein, to pass for any considerable distance through country rock, having none of the elements of a vein, and through which intervening space there is neither mineral nor walls or seams to be followed, then it may be concluded that the veins are permanently separated, and one cannot be followed from the other through the intervening space into the ground of another."

Here the Court, although admitting that the two detached portions were parts of the same vein, virtually tells the jury that they could not be followed upon the dip. The Court, in effect, told the jury that the identity of the two portions had nothing whatever to do with the right to follow the vein, but that continuity was the only test.

The same theory runs through and is expressed by all these instructions. We do not believe that any authority of the courts sustaining such a position can be found.

The case of *Iron Silver Mining Company v. Cheesman*, 116 U. S. 529, and the opinion of the United States Supreme Court in that case, is the one mainly relied upon by appellant to justify the instructions under consideration, and it is said that such instructions were taken almost bodily from the opinion in that case. There is, however, much more in that case than is contained in the instructions, and much is said which, taking the opinion as a whole, gives a very different meaning and effect to the decision of the Court.

It may be said here, in passing, as was well said by the judge below, in his opinion granting a new trial, that in the United States courts, where there is no restriction upon judges as to commenting to juries upon the matters in evidence, instructions of the court can be applied much more exactly to the questions arising in each particular case, and the judges are not obliged to lay down general propositions of law applicable to conditions or facts in every case. We think, therefore, that instructions of judges of the United States Courts in cases of this character should not be given too extensive or general an application, or taken as establishing the law in cases where the facts are entirely different.

Under our state system of practice, however, the court is forbidden to express to the jury its opinion upon the facts in the case, or to assume as proven any facts which are in controversy between the parties.

We submit that the Cheesman case can in no way be tortured into an authority that continuity is the only test of a right to follow a vein on the dip, and that identity is in no way to be considered.

In 2 Lindley on Mines, section 615, page 771, it is said:

“A vein to be followed upon the dip must be continuous only in the sense that it can be traced by the miner through the surrounding rocks.

“The occurrence of intrusive dykes, faults, and casual displacements do not destroy the legal continuity *or identity* of the vein.” (*Stevens v. Williams*, 1 Morrison Min. Rep. 557.) Appellant’s counsel claim the instructions are legal definitions, and do not comment on the evidence at all. There is no doubt but what the court, under our system of practice, has a right to define legally matters in the case calling for a definition, but it has no right, where it is the duty of the jury and their right to consider all the evidence in the case in coming to a conclusion, to tell them that they must consider only one of several facts in evidence in arriving at their verdict. That is just what was done in this case, and in particular in instruction number XI, where the court told the jury that if they found that two portions of a vein were separated for a considerable distance, they might conclude that the veins were permanently separated, and that one could not be followed to the other through the intervening space of the ground of another.

We do not understand that the prohibition against a court’s discussion of the evidence is confined to preventing the court from giving the jury its own views upon the facts. The court must leave the jury entirely free to pass upon the facts untrammelled by its opinion, or by any assumption upon the part of the court that matters in controversy are proved or established, or that any particular evidence or condition which is controverted establishes a particular fact. (*Wastl v. Mont. U. Ry. Co.*, 17 Mont. 213; *Knowles v. Nixon*, 17 Mont. 473.)

That Instruction XIX does not correctly state the law, there can be no doubt; appellant’s counsel admit it themselves.

But appellant claims that notwithstanding Instruction XIX was wrong, it could have had no effect upon the verdict. It seems to us it is to be considered what effect this wrong instruction may have had upon the jury in arriving at the con-

clusion that the apex of the vein was in the plaintiff's ground. It would be a dangerous precedent to establish for a court to say that wrong instructions to a jury do not vitiate the verdict, because, as it turned out, they found certain facts which might possibly render the instruction immaterial.

It was a very material matter in this case as to whether or not the ore extracted by defendant was or was not taken from between certain planes drawn downward through the vein, and Instruction XIX, in undertaking to fix those planes, certainly lead the jury astray in a material matter in their investigation by prescribing an incorrect rule. And what effect this wrong instruction may have had upon the jury, both in the determination of this and other issues in the case, neither the court below, nor this Court, can now ascertain.

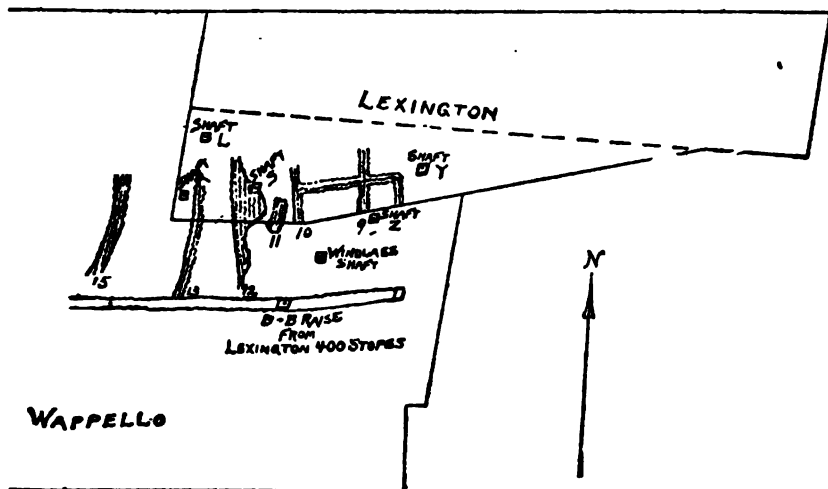
Where error is shown, injury is presumed unless the contrary appears affirmatively. (Hayne on New Trial and App., Sec. 287; *Kelly et al. v. Taylor et al.*, 23 Cal. 11, 15.)

MR. JUSTICE HUNT delivered the opinion of the court.

ACTION to recover the value of ore taken from a vein beneath the surface of that portion of the Wappello lode claim owned by plaintiff (appellant.) The Butte & Boston Mining Company, plaintiff and appellant, owns the south and west portions of the Wappello lode claim, while the Societe Anonyme des Mines de Lexington, respondent here, owns the northeast portion, as indicated by the diagram accompanying this opinion. A. J. Davis formerly owned the Wappello, and both plaintiff and defendant derive title from him; the conveyance to defendant of its portion having been prior to the conveyance of plaintiff's portion to it. Defendant entered beneath plaintiff's premises and extracted ores; hence the principal question involved was whether the vein from which the defendant took the ores had its apex within the surface boundaries of that portion of the Wappello lode claim owned by the defendant, or had its apex within the surface boundaries of that portion of the Wappello owned by the plaintiff. Inci-

dental to the determination of this issue was the question of the amount of damages.

The case was tried to a jury. The evidence was conflicting, many experts for plaintiff claiming that the apex of the vein from which the ores were extracted was in plaintiff's ground, and that it was wholly disconnected with any vein in defendant's ground, while an equal number of expert witnesses called by the defendant testified that, in their opinion, the



apex of the vein was in the defendant's ground. Elaborate instructions were given to the jury, who found for the plaintiff for \$125,000 damages. The defendant moved for a new trial, based upon errors in the instructions the court had given to the jury, and insufficiency of the evidence to justify the verdict and findings of the jury. The court granted the motion for a new trial, and from the order granting such motion the plaintiff appeals to this court.

To illustrate the theory of the district judge, we give verbatim those portions of his charge which, upon review by motion for a new trial, he held to be incorrect statements of the law:

INSTRUCTION 9.

"You will understand, however, that a fragment or portion

of a vein, although it may be sufficiently identified or recognized, will not in itself give its owner the right to enter upon the ground of another and extract ore from other portions of the same vein; for if the two portions of the vein, although once together and forming the same vein, have become separated and as so separated have formed distinct veins, and the original connection has been so broken or obliterated that such connection cannot any longer be followed, then the owner of the portion having the apex cannot enter through such disconnected portions into the land of another."

INSTRUCTION 10.

"Plaintiff and defendant both derive title to the respective portions of the Wappello claim owned by them from the same source.

"It is conceded that the ore, to recover pay for which this suit is brought, was mined and extracted by defendant from beneath the surface of that portion of the said Wappello lode claim owned by the plaintiff.

"Defendant contends that the apexes of two veins lie in that portion of said Wappello lode claim owned by it, and that it has followed the north one of the said veins on its southerly dip into and under that portion of the said Wappello lode claim owned by the plaintiff, and extracted and stoped said ore from said vein, the top or apex of which is in defendant's ground.

"The plaintiff contends that defendant did not and cannot follow said vein continuously from defendant's said ground into and beneath the surface of plaintiff's ground, and to where the said ore was stoped out, and that said ore was taken by the defendant from a vein, the top or apex of which lies within plaintiff's ground.

"Now, to properly understand the respective rights of plaintiff and defendant, it is necessary to define what a vein or lode is. And as to that it is enough to say that a vein or lode is a body of mineral or mineral-bearing rock within defined boundaries in the general mass of the mountain. In this definition the elements are,—the body of mineral or mineral-

bearing rock and the boundaries. With either of these things well established, very slight evidence may be accepted as to the existence of the other. A body of mineral or mineral-bearing rock in the general mass of the mountain, as far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries may be. In the existence of such body, and to the extent of it, boundaries are implied. On the other hand, with well defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode. Such boundaries constitute a fissure, and if in such fissure ore is found, although at considerable intervals and in small quantities, it is called a 'lode' or 'vein.'

"To maintain the issue on its part, the defendant must prove that a lode, as here defined, extends from that portion of the Wappello ground owned by it into and under that portion of the said Wappello ground owned by plaintiff.

"Reverting to the above definition, if there is a continuous body of mineral or mineral-bearing rock extending from defendant's ground into and under the ground of plaintiff, it must be that there are boundaries to such body, and that the lode exists, or if there is a continuous cavity or opening between similar or dissimilar rocks, in which ore in some quantity and value is found, the lode exists.

"These propositions are correlative, and not very different in meaning, except that the first gives prominence to the mineral body, and the second to the boundaries. Proof of either proposition goes far to establish a lode, and it may be said that, without proof of one of them, a lode cannot exist.

"The proposition of the defendant is that the evidence before you shows that such a lode extends from the ground of the defendant into and beneath the ground of the plaintiff, to the point where said ore was stoped out. The plaintiff denies that proposition, and contends that no such vein as is above described, or any vein at all, has been or can be traced from the point at which said ore was stoped out to any point within the ground of the defendant.

"A continuous body of mineral or mineral-bearing rock,

extending through loose and disjointed rock, is a lode, as fully and certainly as that which is found in more regular formation; but if it is not continuous, or is not found in a crevice or opening which is itself continuous, it cannot be called by that name. In that case it lacks the individuality and extension which is an essential quality of a lode or vein.

“And if no such vein as I have herein described can be traced in its downward course and on its dip from an apex of a vein within defendant’s ground into and beneath the surface of the ground owned by plaintiff, and to the point where said ore was stoped out, then defendant had no right to enter into or beneath the surface of plaintiff’s ground; and, if it did so, it was a trespasser, and your verdict should be for the plaintiff.”

INSTRUCTION 11.

“It will be observed from the foregoing instructions that the elements constituting a vein consist of boundaries and the mineral within the vein. Where both boundaries and mineral are wanting, there can be no vein; and, in determining the question of continuity, you may apply the same principle. If it becomes necessary, in order to connect two separate and distinct portions of a vein, to pass for any considerable distance through country rock, having none of the elements of a vein, and through which intervening space there are neither minerals or walls or seams to be followed, then it may be concluded that the veins are permanently separated, and one cannot be followed from the other through the intervening space into the ground of another.”

INSTRUCTION 13.

“The fact that veins unite at one point only, if the same remain separated at other portions of the vein, will not give to one owner the right to enter upon the vein of another, where such veins remain separate or apart. If, therefore, you find from the evidence that the vein belonging to the plaintiff united with the vein of the defendant at one point only, and separates therefrom without uniting at other places,

then the most that defendant can claim is the ore extracted from that part of the vein where so united, and on the dip of such union. As to all other portions of the vein not so united, unless the defendant is shown to be the owner of the apexes thereof, you must find for the plaintiff."

INSTRUCTION 19.

"The west end line of the tract of ground conveyed to defendant by deeds in evidence is not parallel with the west end line of the Wappello lode claim. Under such state of facts, the defendant will be confined in following any vein on its dip, which has its apex in its ground, to a plane drawn downward vertically through the end line as described in the deed executed to it, and extended in its own direction, and not to a plane drawn downward vertically parallel to the original end line of the Wappello claim, at a point where the vein departs on its strike from the ground owned by defendant.

"Unless, therefore, you find the same barred by the statute of limitations, as hereinafter instructed, you must find a verdict for the plaintiff for the value of all ores extracted, if any, by defendant west of the west end line of defendant's ground, extended downward vertically and in its own direction to the point where such ore was extracted."

The foregoing instructions are said by defendant to be erroneous, because the court established continuity as the *sole* and *exclusive* test of the right to pursue the vein on its dip within the surface boundaries of appellant's ground, while the question of *identity*, urged to be of infinitely more importance, was ignored.

The learned judge of the district court who tried the case granted the motion for a new trial upon the ground, among others, that under the federal statutes (Section 2322, Revised Statutes U. S.) granting ownership of veins, and giving to locators or owners of a quartz lode mining claim the exclusive right of possession and enjoyment of all the surface included within the lines of the location, and of all veins, lodes, or ledges throughout their entire depth, the top or apex of which

lies inside of said surface lines extended downward vertically, although said veins or ledges may so far depart from a perpendicular in their course downward as to extend outside of the vertical side lines of such surface location, the substantial fact to be proven by the lode claimant who seeks to pass beyond his side lines so projected is that the vein he is pursuing is the *identical* vein which has its apex within his surface boundaries, and that, if it be the *identical* vein, the fact that its *continuity* has been broken is not determinative of the lack of identity, which is the test of right in such cases. To this proposition relied upon by the defendant we shall assent, with some qualifying explanations, none of which, however, are at real variance with the charge of the judge, or conflict with the opinions of the Supreme Court of the United States, as we interpret them.

The right of an apex proprietor to pursue a vein passing from his side lines is dependent upon whether or not, as a fact, the part or mineral body of vein matter which lies outside of the perpendicular of the side lines of his surface claim is so preserved in its identity with the lode inside that it is part of the same vein, the apex of which belongs to the surface owner. The solution of this question, not infrequently arising in problems of mining litigation, is often very troublesome; and it is in formulating a charge to a jury upon the elements involved in the inquiry that judges enter upon what, some fifteen years ago, Justice Miller characterized as a "delicate task" and "a matter of extreme difficulty." (*Iron Silver Mining Co. v. Cheesman*, 116 U. S. 529, 6 Supreme Court 481.) Judges, under our system, can only prescribe rules of guidance with relation to general principles; they cannot exactly apply these rules, though it is in their application that half the "extreme difficulty" arises,—for the jury has its duty to be performed, and it cannot be interfered with. It is often hard, by looking at a map or model of conflicting mining locations and veins, to state principles which should control the several hypotheses presented in a case; but it is sometimes much harder to correctly ascertain the true facts,

from the testimony addressed to the model, to which the legal principles should be applied. And it will ever be difficult to get at the facts of such cases, until geologists agree upon like deductions from the complex, if not uncertain, conditions of the earth in which mineral deposits are found.

On principle, the identity of the apex of a vein with its spurs or extensions must be the crucial test by which are to be fixed the proprietary rights to that vein and the mineral therein. The full benefit of his discovery is what Section 2322, *supra*, preserves to the miner; and to meet the geologic conditions which exist in the tendency of veins to depart from a perpendicular as they go downward, that the object of the statute might be carried out, Section 2322, Revised Statutes U. S., authorizes a miner to follow the vein on its dip to an indefinite length, wherever it goes,—provided, of course, he has the apex, and provided, further, he does not cross the vertical planes of the end lines. “The intent of the statute,” said Justice De Witt in *Fitzgerald v. Clark*, 17 Mont. 100, 42 Pac. 273, “is to give the miner a section or block of the vein of a length on the strike which is equal to the length of the apex lying within the exterior vertical bounding planes of the location, and of a depth as far as he desires or is able to work downward; and, at the most remote depth attained, he shall have the same number of feet on the strike as he had at the apex. (*Iron Silver Mining Co. v. Elgin Mining & Smelting Co.*, 118 U. S. 205, 6 Supreme Court 1177.) We have always been of opinion that this is the keynote of the interpretation of Section 2322, Revised Statutes U. S.; that is to say, if the miner has the apex in his location, he is to have the vein, and he has as much length of the vein on the strike, no matter how deep he may go in the dip, as he has length of apex within his surface lines, whether that apex reaches the surface, or is found beneath the same, within the planes of his exterior boundary lines extending downward perpendicularly. This, in our opinion, is what Section 2322 says in plain language.”

The pursuit of the vein on its dip being, then, the right to

be guarded, the identity of the vein pursued must be proven, to make the right availing, where it is contended the vein, after passing beyond the vertical planes drawn through the side lines of the surface boundaries of the location in which rests the apex, penetrates soil the surface of which is embraced within another location. Identity must always exist. Were there any departure from this rule, the miner might secure the benefit of more than he discovered, which was never contemplated by the law. Identity in mineral deposit should have no significance not usual to identity of many other material things. It means the same thing, or the same vein. It may be said to include a vein that is incessant. But a vein that is incessant or identical in its parts is not necessarily a vein which is continuous, in the sense that the continuity or union of its parts is absolute and uninterrupted,—in other words, though a continuity of vein does not preclude identity of vein, yet identity does not necessarily include continuity, in the exact sense just referred to. “Law of continuity (Math. and Physics),” says Webster’s Dictionary, “the principle that nothing passes from one state to another without passing through all the intermediate states.” Speaking exactly by this definition, it would often be very difficult, if not impossible, for the challenged proprietor of a mineral vein to convince a jury of the continuity of the vein from one part to another, for there might not be continuity by actual contact of the parts or contiguity, which the precise word may literally mean must exist. Were such a rule inexorable, a failure of proof would not infrequently be brought about by the inability of the miner to prove continuity without transition through intermediate states. The miner therefore might fall short of that exact measure of evidence required to establish a continuity of vein which excludes any interruption between one and another part of the identical vein, and, judged by too closely interpreted significations, the continuity of the vein would be lost; yet if he prove the identity of his vein by some incessant feature, in our judgment, the right to pursue the lode on its dip is his, and there

should but remain the necessity of going to the surface limits to accurately adjudicate the lines defining the right to the vein so identified. Take, for an example of a lack of continuity, but of practical identity, a true fissure vein, lying in a section of country consisting of sedimentary and eruptive rock. The miner may encounter what he terms a "fault fissure,"—a rupture in the rocks, accompanied by a relative movement of the walls. During the readjustment of the country on either side of the fissure, masses of these walls are torn off, and, falling into the fissure, become vein filling, termed by geologists "conglomerate," "breccia," and "horse matter," as the fragments or masses of unbroken country rock found between the walls may indicate. It can be readily seen that if the fissure is found in a slate country, with intrusions of granite, the filling may consist of slate or granite, or both, while there may even be slate on one wall and granite on the other, or similar or dissimilar formations or fillings on either or the two. The mineralization of the vein—the deposition of the precious metal—occurs subsequent to the rupture only in such places between the walls as form channels or are pervious to mineral solution. Now, the miner's object is to disclose and mine the mineralized portion of the vein, and to do so economically. But he will not necessarily continue his exploitation from an initial point. He may work at numerous points on the vein, or he may drive a tunnel through extraneous rock to tap the vein at a point quite remote from his other workings. If he finds pay ore in one part of his claim, and he finds it occurring in mineralized quartz accompanying slate breccia, and in another part he finds barren granite conglomerate, he is at once confronted with a serious difficulty,—of proving the chances of a continuity by *contiguity* of deposit; but if he has developed his claim so as to prove the existence of a fissure with a certain relative movement between its walls, and he finds ore accompanied by slate breccia in the one part, and broken granite in another, if in this last-considered portion he determines that his new find practically corresponds in dip and strike with the known portions of the

fissure, and if the newly-developed walls show certain evidences, by way, perhaps, of striations or corrugation, or otherwise corresponding in dip to those determined in other portions, and the position of the newly-developed deposit occurs approximately in the plane of the fissure, he has practically identified his vein at this point, and is justified in assuming that he can follow the walls just developed, incessantly, until he connects them with the walls determined in other portions of his mine, and he may claim the lawful right to do so under the statutes of the United States.

In this discussion, however, we do not mean to exclude the need of a continuity sufficient to preserve identity. The application of the rule of identity of vein should always be made so as to require the miner to trace his lode continuously, if he depart beyond his extended side lines. There must always be in any lode that "zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock." (*Eureka Consol. Min. Co. v. Richmond Min. Co.*, 4 Sawy. 302, Fed. Cas. No. 4,548.) Nevertheless there may be an identical vein, although ore is found at considerable intervals and in small quantities, if the boundaries constituting the fissure are well defined. It is hard to frame any statement that will express the correct rule with the directness that marked the language of Judge Hallett in *Iron Silver Mining Co. v. Cheesman*, approved by the Supreme Court of the United States in 116 U. S. 529, 6 Sup. Ct. 481. He said: "The proposition of the plaintiff is that the evidence before you shows that a lode exists in the ground in controversy, as already defined. The defendants deny that proposition, and the case turns on that question. They concede that there is, in the territory open by the works, ore in detached masses or fragments, but so intermingled with the inclosing rock that it cannot be regarded as a continuous body, or as marking the line of a lode or vein. All that has been said by witnesses about rock in place is valuable only as it tends to prove or disprove the existence of a crevice or opening extending from one claim to the other. Excluding the wash, slide or debris

on the surface of the mountain, all things in the mass of the mountain are in place. A continuous body of mineral or mineral-bearing rock, extending through loose and disjointed rocks, is a lode, as fully and certainly as that which is found in more regular formation; but if it is not continuous, or is not found in a crevice or opening which is itself continuous, it cannot be called by that name. In that case it lacks the individuality and extension which is an essential quality of a lode or vein. Recognizing this, the plaintiff has given evidence to establish the existence of porphyry and lime in regular order, with an opening between them filled with vein matter."

It becomes, then, a question of fact, to be decided by the jury subject to general rules, whether there is that essential identity and continuity by which the vein can be traced through the surrounding rocks. The Supreme Court of the United States, in *Iron Silver Mining Co. v. Cheesman*, *supra*, said: "Certainly the lode or vein must be continuous, in the sense that it can be traced through the surrounding rocks, though slight interruptions of the mineral-bearing rock would not be alone sufficient to destroy the identity of the vein. Nor would a short, partial closure of the fissure have that effect, if a little further on it recurred again with mineral-bearing rock within it. And such is the idea conveyed in the previous part of the charge. 'On the other hand,' said the judge, 'with well defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode. Such boundaries constitute a fissure, and if in such fissure ore is found, although at *considerable* intervals and in small quantities, it is called a lode or vein.'"

The true sense in which there must be a continuity of vein is therefore a qualified one, and not an unqualified, exact one, irrespective or independent of physical conditions found in mining. It may be said, as a paraphrase of the decision cited, that identity is essential, and the vein must be continuous, but its continuity may be interrupted, even to a closure of the fissure, without destruction of the identity, provided the extent

of the interruptions or closure does not prevent the tracing of the lode or vein through the fissure to be identical in its parts as a geological fact. (Lindley on Mines, pp. 770, 1123; *Cheesman v. Shreeve*, 40 Fed. 787.)

Going directly now to instructions 9 and 10 quoted, we find that they did not establish the proposition that continuity was the *sole* test of the right to pursue the vein extralaterally, to the exclusion of identity. True, they emphasized the necessity for continuity, but that was but one phase of the right of pursuit upon which stress was laid. But that it was not established to the exclusion of the question of identity is quite apparent by examining instruction No. 8, just preceding No. 9, wherein the court asserted the following rule of law:

"Before the defendant would be entitled to follow a vein, having its apex within the defendant's ground, beyond the boundary lines, and into the ground owned by the plaintiff, it must be shown by the evidence that the vein so followed is continuous from defendant's ground into that of the plaintiff. By 'continuity' is meant such mineral or geological connection as would enable one to follow the vein along its dip, and through the obstructions, interruptions and breaks which may occur therein, with reasonable certainty that it is the same and identical vein throughout its depth, from the apex to the point or points of controversy.

By this definition of "continuity" the jury were confined within limits which required the continuity of vein to be one where the mineral or geological connection was such that, though it might be interrupted, still it must be sufficient to enable the miner to follow the dip with reasonable certainty that the vein, though obstructed or interrupted, is the *same* and *identical* vein throughout its depth from the top to the point in controversy. This definition of a "continuous vein" was not excepted to; nor is it adverted to by the defendant's counsel in his brief; but it seems to us to have been a most important instruction,—one upon which the jury were authorized to proceed, holding always, however, to the need not only of a continuous vein in the sense approved of by the

supreme court of the United States, and by ourselves herein, but that it must be so continuous as to demonstrate that it is the *identical* vein from the apex down. Thus, the court appears to have based its instructions upon a premise of the requirement of identity; and mere omission to not direct the jury more fully upon every phase of the case presenting the relation of identity was not error, appropriate complimentary instructions not having been requested and refused. (Thompson on Trials, sections 2346, 2328.)

The respondent particularly objects to that portion of instruction 11 where the court said that "if it becomes necessary, in order to connect two separate and distinct portions of a vein, to pass for any considerable distance through country rock, having none of the elements of a vein, and through which intervening space there are neither minerals or walls or seams to be followed, then it may be concluded that the veins are permanently separated, and one cannot be followed from the other through the intervening space into the ground of another." It is argued that by this sentence the court, while admitting that the two detached portions were parts of the same vein, "virtually told the jury that they could not be followed on the dip." The right of a jury to draw its own conclusions of fact from the evidence before them is elementary, under the practice of this state. Hence we agree that the court must avoid language which "virtually" decides facts, and withdraws their determination from the consideration of the jury; but we cannot think there was fatal error in telling them they might conclude that the veins were permanently separated where every one of the conditions enumerated in the hypothesis was found to exist as a proven fact, for the combination fairly excluded all reasonable chance for a continuance and identity of vein. The instruction ought to have been slightly modified, so as to avoid any possible danger of implying an opinion of the judge that there was no need of identity, and it would be well to revise it on another trial; but we are not satisfied that it was objectionable to the extent of having been prejudicial. In defining matters calling

for definition, a court may certainly put before a jury the prerequisites necessary to be proven before a certain condition can exist, provided it is left to the jury to decide the question of fact involved in each prerequisite, and provided they are not told that they *must* deduce any certain conclusion from the facts if found to be true.

It is also contended that the word "considerable" was meaningless, as used, and was only calculated to confuse the jury. To support this reasoning, the case of *Stevens v. Williams*, 1 Morr. Min. Rep. 566, Fed. Cas. No. 13,413 is referred to. In that case, under the evidence, which was treated as uncontradicted, the judge refused to use a similar term because it conveyed no accurate conception of the extent to which a vein might be interrupted, yet not cease to be a lode or vein upon which a miner had a right to pursue it into the adjoining land. Doubtless, under the facts of the case, considering the practice which obtains in the federal courts, where judges have a right to comment upon matters in evidence, that truly great judge (Miller), who refused to so charge, was correct in regarding the term "considerable" as too indefinite and as unwarranted by the evidence; but that he did not afterwards look upon it as generally too vague a term, when used in a charge substantially like that under consideration in the case at bar, is made plain by his express approval of its use by Judge Hallett in the *Iron Silver Mining Co. v. Cheesman* case, heretofore referred to, where, as the organ of the supreme court, he quoted Judge Hallett's statement that what is called a "vein" or "lode" exists where boundaries, as defined in the opinion, are found, constituting a fissure, and where in such fissure ore is found, "although at *considerable intervals and in small quantities*." As part of an oft-given definition, therefore, it was not unfitting,—surely not inaccurate,—when considered with the previous instructions, which, as far as they went, set before the jury the law, and qualified the definition by explaining what continuity of vein gives the miner a right to pursue it on its dip and extralaterally.

The only objection urged by respondent to instruction 13 is

that in it the court assumed the existence of a fact in controversy, namely, that plaintiff had a vein which united with defendant's vein. Inasmuch as defendant denied the existence of any vein in plaintiff's ground which united with the vein in dispute, the court, upon retrial, should avoid reference to 'the' vein, and thus obviate the criticism applied to the instruction as framed.

Appellant says the court erred in granting a new trial because of error in instruction 19, *supra*. As said before, plaintiff and defendant are owners of different portions of the Wappello mining claim, and derive title from the same source. It will be observed, too, that the west end line of the Wappello, as located, is not parallel with the west end line of the tract conveyed to defendant. The deed to the plaintiff from A. J. Davis was also subsequent to his deed to defendant's grantors, and was made subject to the conditions and grants of the deed to the defendant's grantors. It will be seen that the instruction under examination confined the defendant, in following a vein on its dip, to a plane drawn downward vertically through the end line as *described in the deed* from Davis to defendant's grantors, extended in its own direction, and forbid the right to a plane drawn downward vertically parallel to the *original end line* of the Wappello, at a point where the vein on its strike leaves the ground owned by the defendant. The judge of the trial court, when he granted a new trial, was of the opinion that under such circumstances defendant's grantors made their grant in view of the mineral character of the land conveyed, and did not except from it any of the mineral rights which theretofore existed in, or attached to, the portion thereby conveyed, and for this reason he regarded the instruction given as manifestly wrong. On this question the court was asked, but refused, to charge as follows: 'If the jury believe from the evidence that the ore in controversy in this action, and which was taken by defendant from the Lexington stopes, beneath the surface of that portion of the Wappello claim owned by plaintiff, was taken from a vein or veins which have their top or apex north of the dividing line be-

tween the Butte & Boston portion of the Wappello and the Lexington portion of the Wappello, and within the surface lines extended downward vertically of said Lexington portion of said Wappello claim, and from between vertical planes drawn downward at the surface, one through the easterly end line of the Wappello claim location, and the other through a line parallel to said easterly end line and also to the westerly end line of said location, at a point where such vein or veins having their top or apex within the surface lines extended downward vertically of said Lexington portion of said Wappello claim departs on its course or strike from the west surface end line of said Lexington portion of said Wappello claim, so continued in their own direction that such planes will intersect such exterior parts of such vein or veins, then and in such case said ore was the property of defendant, and it had a right to extract the same, and plaintiff cannot recover damages therefor, and the jury will find for the defendant."

By its refusal to give the charge requested, and by having given instruction 19, there arises the important question of whether, under certain conditions as presented herein, a miner must follow along a plane of the end line of the claim drawn down at the point of departure of the vein from the *conveyed* premises, or must follow the plane of the end line of the conveyed premises which may cross the vein. We approach the solution of this matter at this time with extreme hesitation, for the reason that the counsel for appellant, at whose request instruction 19 was given, candidly says in his brief that "he never believed the doctrine announced in the instruction [given] to be a correct one," but that, as the question was an open one, it could only be preserved for review by asking the court to charge as it did in said instruction 19. The court is therefore somewhat embarrassed by being asked to determine a vexed and difficult matter, where counsel for both sides, for whose proficiency and learning upon the law of mining we entertain the highest respect, and the judge who granted a new trial, agree that the court, by instruction 19, incorrectly

stated the law to the jury. It would certainly save some confusion to hold to the rule, upheld by counsel and court, that the end line of a claim should determine the limits on the dip of the vein taken at any point along the vein, so that a purchaser of a portion of a claim would acquire so much of a vein on its dip as he has apex at the surface, the limits on the dip of the vein to be fixed by the course of the true end lines of the claim from which the portion was conveyed; and such a holding would harmonize with the principle of saving to the miner the right to follow the dip wherever it goes, if he has the apex, and keeps within prescribed vertical planes. But in a recent decision by Judge De Haven (*Boston & M. Consol. Copper & Silver Min. Co. v. Montana Ore-Purchasing Co.*, 89 Fed. 529) a contrary rule was laid down, and support for it put in the cases of *Richmond Min. Co. v. Eureka Min. Co.*, 103 U. S. 839, and *Stinchfield v. Gillis*, 107 Cal. 86, 40 Pac. 98. We hardly think the last case went as far as Judge De Haven did, although the opinion states, in part, that "if the proprietor of a tract of mining ground, which has been derived through several locations, should dispose of the same in parcels irrespective of the lines of such locations, the rights of his guarantees would be measured by the terms of their deeds." Nor does the opinion of the supreme court of the United States in *Richmond Min. Co. v. Eureka Min. Co.*, *supra*, fully sustain the federal case cited; for the facts relieved the court of the necessity for considering what, if any, presumptions attach to the grant of a conveyance of a part of a patented mining claim. As a decision upon the point is not necessary, owing to the condition of the record, and considering the concurrent views of counsel for both sides, we prefer to reserve the question until it shall come before us in some instance wherein the doctrine of the federal court is submitted to us with the earnest support of counsel as the true and correct rule of law, and not with a conviction of its inaccuracy.

It is urged that, even though instruction 19 was erroneous, it became unimportant, in the light of the finding by the jury

that the vein in question was entirely south of the dividing line between the Wappello and Lexington, and all belonged to the plaintiff; but, as the order granting a new trial must be affirmed on other grounds, it would serve no purpose to examine the finding and the evidence bearing upon it to see if the instruction was correct.

Finally, appellant insists that the court ought not to have granted a new trial because, as counsel puts it, "not satisfied with the verdict of the jury." This expression is the deduction of counsel from the opinion delivered by the district judge when he made the order granting the defendant's motion for a new trial, copy of which is in the transcript. The order of the court was as follows: "This day the motion herein for a new trial is by the court sustained, to which ruling plaintiff by counsel duly excepts." "The opinion is not part of the record, and cannot be resorted to for the purpose of adding to the order sought to be reviewed. (*Menard v. Montana Central Railway Co.*, 22 Mont. 340, 56 Pac. 592.) This being true, and the court not having made an order explicitly excluding the ground that the evidence was insufficient to justify the verdict, and the record showing a substantial conflict in the evidence, this Court must affirm the order as made within the sound discretion of the trial court.

We will add, however, that as counsel for both sides seem to have made their briefs upon the assumption that the old practice of making the opinion of the district judge part of the record still obtains, we have carefully read it and considered it, as an aid to the decision herein, and are still of the opinion that the fair inferences to be drawn from the reasoning of the trial judge are that he believed there was an insufficiency of the evidence to justify the verdict, which was one of the grounds specified in the motion for a new trial made by the defendant. It therefore followed from that belief that the judge was justified in granting the motion (*Patten v. Hyde*, 23 Mont. 23, 57 Pac. 407); and it now further follows that the order must be here sustained. It is so ordered.

Affirmed.

YANK, APPELLANT, v. BORDEAUX, RESPONDENT.

[No. 1,186.]

23 205
31 181

[Submitted July 11, 1899. Decided July 24, 1899.]

*Fraudulent Conveyances—Change of Possession—Contracts—
Construction—Mining Lease—Rights of Lessee.*

1. Where a joint owner of personalty which is in the possession of another joint owner sells his interest, the purchaser's failure to take possession does not, as against execution creditors of the seller, avoid the sale, under Civil Code, Section 4491, providing that every transfer of personal property by a person in possession or control of the property shall be conclusively presumed to be fraudulent, and therefore void, if not accompanied by an immediate delivery, and followed by actual and continued change of possession. Such presumption is to be indulged only where the person making the transfer has at the time the possession or control of the property.
 2. Where one of several joint owners of personalty sells his interest, the purchaser need not notify the other co-owners of the sale, in order to make it valid as against execution creditors of the seller.
 3. After plaintiff had purchased personalty in possession of third persons, it was seized by an officer under execution against the seller. In an action against the officer for the proceeds of its sale, *held*, that plaintiff's failure to notify defendant and the seller's creditors of the sale, prior to the levy, did not preclude his right to recover.
- Obiter:* The general rule is that an attaching or execution creditor succeeds to and acquires only the rights of his debtor, while a purchaser for value and without notice may acquire greater rights and a higher title than his vendor possessed.
4. The lessees of a mine agreed with plaintiff's assignor to operate the mine, in consideration of plaintiff's assignor furnishing all necessary supplies, the net proceeds of the ore, after milling, to be equally divided between the lessees and plaintiff's assignor. *Held*, that in determining the net proceeds only the cost of smelting, and not the costs of mining, hoisting and handling the ore, should be deducted from the gross proceeds.
 5. Where plaintiff purchased ore of one who obtained it of the lessees of a mine, his title was not affected by a forfeiture of the lease after the ore had been mined, in the absence of evidence that such forfeiture carried with it the right to ore previously mined.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

ACTION by John Yank against T. J. Bordeaux, constable. From a judgment for defendant, and an order overruling plaintiff's motion for new trial, plaintiff appeals. Reversed.

Messrs. Howell & Harney, for Appellant.

Mr. John W. Cotter, for Respondent.

The transfer of personal property, not accompanied by an immediate delivery and an actual and continued change of possession, is conclusively presumed to be fraudulent and therefore void as against the creditors of the vendor. (Civil Code, Sec. 4491; *O' Gary v. Lowry*, 5 Mont. 427, 431-32; *Bunting v. Saltz*, 84 Cal. 168.) The mere fact that the appellant's grantors had an undivided interest in the property would not relieve appellant from the necessity of taking possession of the property and complying with the provisions of Section 4491 of the Civil Code. Where one of two partners sells to a third person his interest in a stock of goods belonging to the partnership, there must be an immediate delivery and continued change of possession as required in the said section, or the sale will be void as to creditors. (*Newell v. Desmond*, 63 Cal. 242.) Section 4491 of the Civil Code applies to a sale of an undivided interest by a joint tenant of a chattel in actual possession. (*Brown v. Niel, Sheriff*, 95 Cal. 262, 30 Pac. 538.) If the property is so situated that the purchaser can take possession of it at pleasure, his failure to do so renders the previous transfer void as to the creditors of the vendor. (*Pierce v. Boggs*, 99 Cal. 340, 33 Pac. 906.) If a debtor in anticipation of a judgment or claim against him fraudulently conveys his property to another, who is privy to the fraud, with intent to hinder or delay his creditors who thereafter obtain judgments and levy executions on the property in the hands of the fraudulent grantee, such grantee cannot recover the property from such judgment creditor or from the officer levying upon the same. (*Greer v. Wright*, 52 Amer. Dec. 111, Notes 113, 114-19; *Marshall v. Buchanan*, 35 Cal. 264.)

MR. JUSTICE PIGOTT delivered the opinion of the Court.

The plaintiff, claiming to own an undivided one-half interest, amounting to \$434.38, in certain ores treated at the Parrot smelter, brought this action for damages against the defendant, who, as constable, had levied upon and seized such interest on executions against the property of Pohndorf, Pear-

son and Thompson, in favor of their judgment creditors, and who, upon demand, refused to release the levy, or to pay the said amount to the plaintiff. The issues were tried by jury, and a general verdict for the defendant was returned. The plaintiff appeals from an order overruling his motion for a new trial and from the judgment.

For the purposes of the case, the facts to be considered in deciding the questions necessarily involved may be summarized as follows: On the 11th day of March, 1896, one Hughes and seven men associated with him, became the lessees for the term of 90 days of the West Elbe lode mining claim. On the same day a written contract was entered into between Hughes and his associates as parties of the first part, and Pohndorf, Pearson and Thompson, as parties of the second part, in which the parties of the first part described themselves as being lessees of the West Elba lode mining claim, and whereby it was agreed, among other things, that the parties of the first part should furnish the labor of eight men each day, and operate the mine, and the parties of the second part should provide all supplies and materials necessary to carry on the work; the net proceeds of the ore, after milling or reduction, to be divided equally, the parties of the first part to have one half and the parties of the second part the other half. From the 12th day of March to the 1st day of May, 1896, the parties of the first part were in actual possession of and working the mining claim, and whatever possession the parties of the second part had was merely constructive. On April 29, 1896, the parties of the second part, named in the contract, for a valuable consideration sold and assigned to the plaintiff all their right, title and interest in and to about 20 tons of silver and gold ore then contained in the ore house and bins of, and extracted from, the West Elba mine, as well as their right and share in and to the net proceeds of the same as soon as it should have been milled or worked, as their interest appeared by the contract mentioned. After the delivery of the bill of sale to the plaintiff, his agent, in company with Pohndorf, went to the mine, where they found Hughes, who was the

only one of the lessees on the surface. They notified him of the transfer, and read the bill of sale to him, requesting him to inform his associates that the transfer had been made, which Hughes promised to do. Hughes, Pohndorf and the plaintiff's agent then went to the ore house, and identified and examined the ore in the bins, but the plaintiff did not at any time take actual possession thereof. Even if the parties interested had desired to divide the ore, it was not susceptible of fair division, as it was of unequal grades, some portions of it going several hundred, and some only twenty, dollars to the ton. This ore was afterwards delivered by the lessees to the Parrot smelter, and while in the possession of the smelter, and between the 1st and 7th days of May, the defendant, as constable, levied upon one-half of the net proceeds of the ore as the property of Pohndorf, Pearson and Thompson, under executions against their property, issued upon judgments rendered in actions brought by three of the lessees to enforce claims in existence when the assignment to plaintiff was made. The proceeds of the ore, after deducting the charges for its treatment, amounted to \$868.76, one-half of which the defendant, by virtue of the writs in his hands, collected from the Parrot company as belonging to Pohndorf and others. While the net proceeds claimed by the plaintiff were in the possession of the defendant, and before he had applied any thereof towards the satisfaction of the judgments, the plaintiff demanded the release of the money, and requested the defendant to pay it to him, which the defendant refused to do. In the view we take of the case, the other evidence need not be stated.

1. Section 4491 of the Civil Code declares that "every transfer of personal property * * * is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession." The theory of the court

and of the counsel for the defendant was that this section applied to the facts disclosed by the evidence, and the jury were accordingly instructed that, if the ore had been broken, and hoisted out of the mine, and was in the bins, at or before the time of the transfer by Pohndorf, Thompson, and Pearson to the plaintiff of their interest in the ore, and the plaintiff did not take and retain the actual and continued possession thereof thereafter, then the sale to the plaintiff was void, and the verdict must be for the defendant. The theory of the court was wrong, and the instruction erroneous. The conclusive presumption that a transfer of personal property, in the absence of an immediate delivery and actual and continued change of possession of the subject of the transfer, is fraudulent and void as to the creditors of the person making the transfer, is to be indulged only where the person making the transfer has at the time the possession or control of the property. The presumption does not arise from want of immediate delivery unless the seller or assignor had at the time possession or control of the thing sold or assigned. Pohndorf, Thompson, and Pearson were the owners, in common with Hughes and his associates, of certain ore in bins situate upon the West Elba mining claim. They transferred their title and interest to the plaintiff. At the time of the transfer they were not in possession or control of the ore, but their co-owners were then lawfully in the actual possession and control of the common property, and so remained until it was sent to the smelter for milling and reduction. Under such circumstances, a sale by a tenant in common may not be avoided by creditors upon the ground that the chattel was not delivered to the purchaser, for, as Mr. Freeman expresses the rule of law in Section 167 of his work on Co-Tenancy and Partition: "If A. and B. together own personal property, of which A. is in actual possession, and B. sell his moiety to C., the possession of A. immediately becomes the possession of C. also. Therefore, being at once, by presumption and construction of law, put in possession as tenant in common with A., it is not necessary that C. should take actual possession with A. to

make his purchase good under the statute of frauds as against the creditors of B. If A., the co-tenant in possession, had sold his interest, then the sale should have been followed by an actual change of possession, because there was no co-tenant whose actual possession could have operated for the benefit of A.'s vendee." And in Section 153 of his treatise on Executions: "The sale by one of several joint owners also furnishes an exception to the rule that there must be a change of possession. If the co-tenant selling is in the sole possession, he ought to give possession to his vendee; but, if the other co-tenants are in possession, the vendor has no right to take it from them. He may, therefore, from necessity, make a valid sale without placing the property in the custody of his vendee." The distinction pointed out is recognized in California, from the statutes of which state Section 4491, *supra*, was adopted. (*Brown v. O'Neal*, 95 Cal. 262, 30 Pac. 538.) Additional reason for applying this rule to the case at bar lies in the fact that the several portions of the ore differed so greatly in value as to make a division impracticable without defeating the design of the owners, and working injustice to some of them. For practical purposes, the ore was indivisible. In *Brown v. Graham*, 24 Ill. 628, the court say: "Property indivisible in its character, owned by tenants in common, is incapable of a several possession by each tenant. It therefore follows that the possession of one of the defendants is a constructive possession of the others. And when one of the joint owners, not in the actual possession, sells his interest in the property, the purchaser succeeds to all of the rights of his vendor, as held by him, without an actual delivery of possession. He, by such a purchase, becomes a tenant in common, and the possession of his co-tenant is constructively his possession. It is, however, otherwise when the tenant in common, having the actual possession, makes a sale of his interest, as the possession must, in that case, to be valid as against creditors and purchasers, accompany, and remain with, the title."

Whether or not Hughes informed his mining partners of

the assignment made to the plaintiff is, as matter of law, immaterial. Our attention has not been drawn to any rule of law requiring notice to be given to co-owners in actual possession of the common property of a sale by co-owners whose possession is merely constructive. We do not think that the omission of notice avoids such sale as to creditors of the vendors, and hence we do not decide whether the notice given to Hughes served as a notice to his associates.

2. The jury were instructed that, if the plaintiff had not, prior to the levy, notified the defendant and the attaching creditors of the sale to the plaintiff of a half interest in the ore and its net proceeds, the verdict should be in favor of the defendant. This was prejudicial error. Whatever may be the correct rule as to the necessity, in some cases, of giving notice in order to complete a transfer, or to protect or make secure the title of a vendee or assignee, as against a subsequent good-faith purchaser or assignee of the same chattel or interest therein, or of the same chose in action,—a subject upon which the courts hold divergent views (see *Graham Paper Co. v. Pembroke* [Cal.] 56 Pac. 627),—it is not applicable to the facts of the case at bar. Subject to certain exceptions, none of which is presented in this case, the general rule is that an attaching or execution creditor succeeds to and acquires only the rights of his debtor (*Reynolds v. Fitzpatrick*, 23 Mont. 52, 57 Pac. 452; *Oppenheimer v. Bank*, 20 Mont. 192, 50 Pac. 419; *McAdow v. Black*, 4 Mont. 475, 1 Pac. 751), while a purchaser for value and without notice may acquire greater rights and a higher title than his vendor possessed (Pomeroy, Equity, Jur. Sec. 698). Had the defendant, prior to notice of the plaintiff's claim, paid over the money collected under the levy, the plaintiff would doubtless be without remedy against him. It is plain, however, that notice to the defendant of the sale while he held the funds under the writs was sufficient to save and protect the right of the plaintiff thereto.

3. That the sum of \$434.38 was one-half of the net proceeds of the ore was not controverted on the trial. More-

over, the funds levied upon were net proceeds, within the meaning of the contract between Pohndorf and others and Hughes and others. Hughes and his associates were to furnish and pay for the labor, while Pohndorf, Thompson, and Pearson were bound at their own cost to furnish all things necessary to the proper working and operation of the mine; and the net proceeds of the ore after milling or reduction were to be equally divided. So the contract provides. It is therefore apparent, at least in the absence of evidence in respect of possible outlay incident to delivery at the smelter, that the expression "net proceeds" was employed and understood as signifying the avails of the ore, less charges of milling and reduction only. The instructions of the court to the effect that the burden was upon the plaintiff to show that there were net proceeds, and that the term meant net value of the ore after deducting all proper charges for mining, hoisting, handling, and smelting and reducing it, were misleading, confusing and erroneous.

4. Another instruction was to the effect that if, at the time the defendant levied upon the proceeds of the ore, "James A. Murray, one of the owners of the said claim, had forfeited the said lease, and thereupon the said Carston, Wallin, and Olson commenced suits against the said Pohndorf, Thompson, and Pearson to recover the amounts due them, the lease had been canceled and forfeited, the said Pohndorf, Thompson, and Pearson had no right to the net proceeds of the said ore, and you should find a verdict in defendant's favor." With respect to this instruction, it is sufficient to say there was no evidence tending to show that the right of Pohndorf, Thompson, and Pearson to a share of the ore already mined, and its net proceeds, would be lost or impaired by the act of the owner of the claim in declaring or enforcing a forfeiture of the lease made to Hughes and his mining partners.

Under the instructions of the court the jury were in duty bound to find for the defendant, whereas we are constrained to believe that the evidence tended strongly and without contradiction to establish the plaintiff's right to recover. There

was not even a suggestion of, nor was an effort made to show, any fact or circumstance casting doubt upon the genuineness, the validity, or the *bona fides* of the assignment to the plaintiff.

The order refusing a new trial and the judgment are reversed, and the cause is remanded.

Reversed and remanded.

IN RE WELLCOME.

[No. 1,401.]

[Submitted July 28, 1899. Decided August 1, 1899.]

Attorney—Disbarment—Materiality of Evidence as to Failure of Criminal Prosecution—Bribery of Legislator—Sufficiency of Attempt at Criminal Prosecution—Verification of Accusation.

1. In disbarment proceedings grounded on an alleged bribery, an affidavit stating the existence of prejudice in favor of the accused in the county where criminal proceedings were attempted against him is immaterial, when it does not state that the failure of the criminal proceedings was due to this prejudice.
2. Where evidence tends to show that an attorney has been guilty of bribing a legislator, it is sufficient to justify disbarment proceedings, although the act was done in his private, not in his official, capacity.

Obiter: A lawyer who is guilty of willful bribery of members of the legislature is unworthy of the honors and responsibilities accompanying the office of an attorney and counselor at law.

3. In disbarment proceedings based on alleged bribery of a legislator, it appeared that a grand jury had been called to investigate the bribery by the accused; that they had examined witnesses, and failed to find an indictment; that thereupon the attorney general stated to the court that there were grounds for indictment, and asked for another grand jury, which was refused. No further criminal proceedings were instituted. *Held*, that this attempt at criminal prosecution was sufficient to justify the investigation of the charges by the Supreme Court as grounds for disbarment.
4. It is not necessary that, as a condition precedent to the exercise of the jurisdiction of the Supreme Court in a disbarment proceeding, repeated efforts be made to secure an indictment for crime, or that unusual and extraordinary procedure be invoked under the Criminal Code; it is sufficient to justify the institution of disbarment proceedings in the Supreme Court, if the ordinary and usual forms of the criminal practice and procedure have been pursued.
5. Under Code of Civil Procedure, Section 420, providing that an accusation must be verified by an oath that the charges therein are true, an accusation in disbarment proceedings wherein some of the charges are verified only on information and belief, and others are positively sworn to, is partially valid, and will stand against an objection aimed at the entire accusation.

23	213
23	259
23	451
23	468

23	213
26	246
26	251
26	504

23	213
33	445

IN THE matter of the disbarment of John B. Wellcome. Accused objects to the sufficiency of the accusation. Overruled.

Mr. Jesse B. Root, Messrs. Carpenter & Carpenter, and Mr. William Wallace, Jr., for accused.

Mr. C. B. Nolan, Attorney General, amicus curiæ.

PER CURIAM.—After our decision holding that this Court had jurisdiction to hear and determine the charges made against the accused herein, but that we would decline to inquire into the truth of the charges unless the accusation stated facts warranting the exercise of our jurisdiction, and which were not stated in the accusation considered on the former hearing (*ante* p. 140, 58 Pac. 45), the attorney general filed affidavits stating the grounds upon which he asks the interposition of this Court. The affidavit of the attorney general is as follows:

“Affiant shows that during the session of the last legislative assembly, and bearing upon the corrupt use of money to influence the action of the members of said legislative assembly in voting for a United States senator, testimony was given before a legislative committee appointed for the purpose of hearing testimony regarding rumors as to the corrupt use of money, and that on the 10th day of January, 1899, a report was made by said committee, at a joint session of the legislative assembly, in which report was incorporated the testimony of Fred. Whiteside, W. A. Clark, Henry L. Myers, members of said legislative assembly, and A. J. Campbell; that upon the presentation of said report, a resolution was duly moved, seconded, and adopted by said joint assembly, which said resolution is as follows:

“*Resolved*, By the house of representatives in joint assembly with the senate, that the evidence submitted to the joint assembly by the joint committee of the senate and house is sufficient to convict the persons therein named of the crime of bribery in any district court of this state, and therefore we request

that the judge of the district court of the First judicial district in and for the county of Lewis and Clarke call a session of the grand jury in said district to take up and examine into the matters stated in said report, as they would in any other case of alleged crime against the peace and dignity of the state.'

"That on the 12th day of January, 1899, the Honorable Sidney H. McIntire, judge of the district court of the First judicial district, deeming occasion therefor, issued a call for a grand jury to investigate the charges of bribery reported in connection with the election of a United States senator, and that on the 14th day of January, 1899, a grand jury was regularly impaneled, and thereupon entered upon the performance of its duty; that from the said 14th day of January, 1899, with interruptions through adjournment, the said grand jury continued in session until the 26th day of January, 1899; that several witnesses were examined before said grand jury respecting the alleged use of money in the senatorial contest then pending.

"Your affiant says that he was present at all the sessions of said grand jury when witnesses were examined, and that there was also present at all of said sessions Odell W. McConnell, the duly elected, qualified, and acting county attorney of Lewis and Clarke county.

"Your affiant further says that he conducted the examination of all of the witnesses touching bribery charges appearing before said grand jury, with the exception of John B. Wellcome, who was not examined by your affiant, and who, in the judgment of your affiant, considering the character of the testimony adduced before said grand jury, should not have been brought before said grand jury, as will appear further on; that all of the witnesses appearing before said grand jury were likewise examined by said Odell McConnell, and that the examination of Mr. Wellcome was conducted entirely by the said Odell W. McConnell.

"Your affiant further says that he made a stenographic report of the testimony given before said grand jury, and at-

taches hereto, in narrative form, all of the testimony adduced before said grand jury, except in the few instances where the testimony appears by question and answer; that the testimony affixed hereto is correct, and represents substantially all of the testimony of any materiality adduced before said grand jury during its session until the time when the report hereinafter set forth was made by said grand jury, and the report thus made was based exclusively upon the testimony herewith set forth.

“That on the 26th day of January, 1899, the said grand jury completed its investigation of said bribery charges, and reported to the said Hon. Sidney H. McIntire, judge of the district court of the First judicial district of the state of Montana, in and for the county of Lewis and Clarke, as follows:

“In the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clarke.

“In the Matter of the Grand Jury.

“To the Honorable Sidney H. McIntire, Judge of the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clarke:

“The grand jury of Lewis and Clarke county, state of Montana, duly impaneled, sworn, and charged on the 14th day of January, A. D. 1899, herewith submit the following report of its deliberations upon the charges made by the committee of investigation appointed by the Sixth legislative assembly of the state of Montana, now in session:

“We have been in session ten days, and have examined forty-four witnesses, and have also examined all papers, documents, and other legal evidence touching the questions under consideration, and have had produced before us all witnesses who we had reason to believe could shed light upon the questions of bribery, perjury and conspiracy. In the interrogation of witnesses, and in the construction of the law appertaining to matters before us, we have been ably assisted by the attorney general and the county attorney of Lewis and Clarke county.

“ ‘We have carefully weighed all the evidence submitted to us, and, while there has been some evidence which tends to show that money has been used in connection with the election of a United States senator, it has been contradicted and explained in such a way that all the evidence introduced before us, taken together, would not, in our judgment, warrant a conviction by a trial jury.

“ ‘While we have not finally concluded our labors, we deemed the investigation of the matters relating to bribery, perjury, and conspiracy of so paramount importance that a full report on these should be made before taking up other matters cognizable by us, and bringing in a final report.

“ ‘Respectfully submitted.

“ ‘C. F. Ellis, Foreman.’

“ ‘Your affiant respectfully shows and says that upon the presentation of said report he objected to its acceptance, and that in the event this report was final, so far as the investigation of bribery charges or the commission of conspiracy and bribery went, he asked that another grand jury be impaneled to take up the investigation of these bribery, perjury, and conspiracy charges. That, as an item of evidence, were thirty thousand dollars alleged to have been deposited with one Fred Whiteside, in consideration for which votes should be cast for W. A. Clark for the office of senator of the United States, and that, so long as said evidence had a physical existence, with all the participants, as shown by the testimony, appearing before said grand jury, an investigation which failed to make findings for bribery or perjury was incomplete.

“ ‘But your affiant says: That, respecting his said application to secure a further and more effective investigation, the Honorable Sidney H. McIntire, judge of said court aforesaid, refused to impanel another grand jury, and received said report as a final report, so that no further investigation was conducted by said grand jury then impaneled respecting those bribery charges.

“ ‘Respecting the proceedings had upon the submission of said report, the minutes of the court, of date January 26, 1899, read as follows:

“The grand jury came into court this day, and, upon being called, all answered to their names. Whereupon the court asked if they had anything to report. Whereupon the foreman of said grand jury, in the presence of the grand jury and in open court, presented to the court a partial report in writing. Whereupon the said partial report was read by the clerk by order of the court. Whereupon the attorney general of the state of Montana addressed the court in reference to said report, objecting to the receipt of same, and requesting the court to impanel another grand jury. Whereupon the court ordered that the said partial report of the said grand jury be received and filed, and the partial report was then and there duly filed by the clerk, and thereupon the grand jury retired to their room to continue their labors.’

“That no further investigation was had by said grand jury, until finally discharged, of the charges of bribery, perjury, and conspiracy consequent upon the alleged use of money as hereinbefore set forth.

“Your affiant further says that no information has been filed against the said John B. Wellcome, charging him with the crime of bribery or any other offense, and there is not now pending in any court, so far as your affiant is informed, any charge for any acts of bribery alleged to have been committed by him as set forth in the petition for disbarment now on file in this court.

“That during the sessions of said grand jury the question of the propriety of securing the presence of John B. Wellcome before said grand jury to testify arose, and your affiant verily believed that some risk attached to his being compelled, through the process of the court, to appear before said grand jury, in the event an indictment was found against him. Section 200 of the Penal Code of the state of Montana provides as follows:

“‘A person offending against any provision of any section of this Code relating to bribery is a competent witness against other persons so offending, and may be compelled to attend and testify on any trial, hearing, proceeding or investigation

in the same manner as any other person, but the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying. A person so testifying to the giving of a bribe which has been accepted shall not thereafter be liable to indictment, prosecution or punishment for that bribery, and may plead or prove the giving of testimony accordingly in bar of such indictment or prosecution.'

"Notwithstanding the risk attendant upon the presence of John B. Wellcome before said grand jury, and of his testifying regarding bribery charges then under investigation, by reason of the provisions of this section, the said Wellcome was subpoenaed to appear, and did appear, before said grand jury, and was examined as a witness respecting said bribery charges; and further affiant saith not."

The attorney general filed with his own affidavit one made by Fred Whiteside, in which affiant says that in the senatorial contest had during the session of the Sixth legislative assembly of the state of Montana, in 1899, the people of the county of Lewis and Clarke, which is the county in which the seat of government is situate, "were overwhelmingly favorable to the candidacy of W. A. Clark"; that the reason for this sentiment was that the people of said county "felt that they were discharging an obligation due to the said Clark on account of the assistance rendered to the said county of Lewis and Clarke in the selection of the city of Helena as the state capital, and that any means which would accomplish the election of said W. A. Clark were justifiable against the opposition which was offered to his election." Affiant further says that the sentiment of said county was that no indictment should be found against Wellcome, even though he was guilty of the acts of bribery alleged to have been committed by him, that the press and public sentiment indicated opposition to an indictment against Wellcome; and that the sentiment then existing has not abated to any appreciable extent.

Some 24 different counter affidavits were filed in behalf of the accused. These affidavits, for the most part, were made

by residents of Lewis and Clarke county, Mont. Affiants therein stated that there never was at any time during the senatorial contest a sentiment among the people of Lewis and Clarke county that any means were justifiable which would result in the election of W. A. Clark as United States senator, and that the people did not feel that any improper means would be justifiable against the persons who were opposed to his election; and, further, that there never was any sentiment against the finding of indictments by the grand jury empaneled in the district court of Lewis and Clarke county to investigate the charges of bribery, fraud, and conspiracy, but, on the contrary, there was a strong wish and an expressed desire that justice should be done; that neither the press of the city of Helena, nor the people of said city, expressed opposition to the finding of an indictment, but, on the contrary, the general feeling was that the grand jury should and would do its duty, and that a full, fair, and impartial hearing would be given to any case presented; and that the sentiment at that time prevailing has not changed, and affiants believe that full justice can be had in the courts of Lewis and Clarke county.

The Honorable Sidney H. McIntire, one of the judges of the district court of the First judicial district of the state, made the following affidavit, which was also filed in behalf of the accused:

"I am one of the judges presiding in the First judicial district court in the state of Montana, and the one who acted in the matter of the grand jury proceeding referred to in the affidavit of the attorney general filed herein. When the request was made by the attorney general that I call another grand jury to investigate the charges of bribery, the partial report of the existing grand jury was before the court for acceptance or rejection. In this particular report that grand jury stated, in substance, that all the evidence produced before them was insufficient, in their judgment, to justify the finding of indictments by the grand jury, or conviction by a trial jury. No showing, by evidence, affidavits, or otherwise,

in support of his request, was made by the attorney general, either to the effect that indictments should have been found by that grand jury, that under the evidence available another grand jury would find indictments, or that by corruption or disregard of their oath the then grand jury wrongfully refused to find indictments in the face of sufficient evidence. I regarded the report of the then grand jury as final and conclusive upon the matters investigated by them, in the light of the showing made before me. No valid reason was suggested why the matters should be submitted to another grand jury upon the same evidence, and I refused the attorney general's request."

Counsel for the accused have filed their objections to the sufficiency of the accusation and the affidavits in support thereof on the following grounds:

"(1) They fail to show that all means to set in motion the machinery of the criminal law have been exhausted in the county or district having jurisdiction of the alleged offenses, in this:

(a) "The request was for resubmission to another grand jury, and made before the one then acting had made final report or been discharged, and was made on no other showing than the partial report itself.

(b) "It does not appear that any request for order of resubmission was ever made to the other presiding judge of the First judicial district, to whom, by rule of court, is generally confided the criminal business in the district.

(c) "It does not appear that any request has ever been made of either judge for an order directing the county attorney to file an information.

(d) "There is no charge that either judge or the county attorney would not fully discharge all official duty, if called on to act.

(e) "The showing discloses that Judge McIntyre fully discharged every official duty devolving on him in the matter.

(2) "The Whiteside affidavit is immaterial, as neither the community nor the public prefers an accusation of crime, or

orders its preferment, and the state has a perfect right to change the place of trial to another locality when general prejudice is shown to exist.

(3) "The 'synopsis' attached to the Nolan affidavit may not legally be disclosed or considered on this hearing. Said synopsis does not purport to be the whole evidence, or the substance thereof, but only the substance of so much thereof as the affiant, Nolan, considered, in his judgment, material. The evidence in said synopsis discredits itself.

(4) "The said synopsis of evidence is no stronger than, and lends no additional force to, the direct accusations of Whiteside, already before the court, and gives no additional reason for taking jurisdiction.

(5) "The presence of Wellcome before the grand jury is no bar to a further criminal prosecution.

(6) "The grand jury's action is no bar either to a resubmission to another grand jury or to the filing of an information.

(7) The verification is insufficient."

The accused also moves the court to strike from the affidavit of Nolan, filed in support of the accusation, the exhibit denominated 'Synopsis of Evidence before Grand Jury,' on the following grounds:

(1) "The 'synopsis' attached to the Nolan affidavit may not legally be disclosed or considered on this hearing.

(2) "Said synopsis does not purport to be the whole evidence, or the substance thereof, but only the substance of so much thereof as the affiant, Nolan, considered, in his judgment, material.

(3) "The evidence in said synopsis discredits itself."

The question which we shall briefly consider and decide is, does the showing now made in support of the accusation present reasons sufficiently cogent to warrant and to require us, in the proper exercise of our discretion, to take jurisdiction by proceeding to inquire into the charges made against the accused, a member of the bar of this court? We agree with counsel for the accused that the affidavit of Whiteside, stating

that there was a prejudice in the city of Helena and county of Lewis and Clarke in favor of the election of Clark as United States senator, and against the indictment of Wellcome for alleged acts of bribery, is not material to this motion. Whiteside does not say that the grand jury which investigated the charges of bribery were moved by this local sentiment, or that the grand jury were corrupt or acted from improper motives, or that the judge of the district court was in any way or at all so affected, or was influenced in any degree by it. We have therefore eliminated the entire matter of alleged prejudice or sentiment from our consideration.

The record before us, then, shows the following condition of affairs: It shows that the matter of the alleged bribery of members of the legislature in connection with the election of a United States senator was inquired into by a grand jury called by the Honorable Sidney H. McIntire, judge of the district court of the First judicial district; that the grand jury made a report, stating that they had examined 44 witnesses, and various papers, documents and other legal evidence, touching the charges of bribery of members of the legislature, and had considered all the evidence that they believed could shed any light upon the questions of bribery, perjury or conspiracy, but that they had not sufficient evidence before them, in their judgment, to warrant a conviction by a trial jury, and that for these reasons, presumably, no indictment was found or presented. It next appears that the attorney general, at the time that the grand jury made its report consequent upon their investigation upon matters relating to alleged bribery, perjury and conspiracy, asked the court to impanel another grand jury to take up the investigation of these same charges; accompanying the request with the statement that, as an item of evidence, there were \$30,000 alleged to have been deposited with Whiteside in consideration of votes to be cast for Clark for senator, and that so long as this evidence existed, and with all of the participants appearing before the grand jury, as shown by the testimony, their investigation, which resulted in no findings of bribery or perjury, was incomplete. The

judge of the district court refused to impanel another grand jury, and ordered the partial report as made by the grand jury to be filed, and directed the grand jury to retire and continue their labors. No further investigation was had respecting the bribery charges, and no further proceedings have been instituted under the criminal statutes of the state, charging Wellcome with bribery or any other offense; nor is there pending now in any court any charge for any acts of bribery alleged to have been committed by Wellcome, as set forth in the petition for disbarment filed in this court.

In our opinion, it matters not what the reasons were which moved the judge of the district court to deny the request of the attorney general to impanel another grand jury. Assuming that the motion was addressed to his discretion, whether or not he acted wisely or unwisely is not of importance. The fact that he declined to act is material, however, and has been considered of significance by us. The evidence heard by the grand jury, and which accompanies the showing now made by the attorney general, is also material. The failure to lay this evidence before the lower court when it was asked to call another grand jury cannot control the exercise of our discretion in this original proceeding to disbar. The office of that testimony in this court and at this time is to support the application of the attorney general by furnishing reasons why we should, in our discretion, hear these charges, to inquire into the truth of which we have original jurisdiction. For this purpose the evidence is competent. And we are cited to no statute or decision against its use for such a purpose. We have examined the evidence. It tends strongly to show bribery of members of the legislature or conspiracy. If it is true, and there was bribery, it tends further to directly inculcate Wellcome, a member of the bar of this court. On the other hand, if it is untrue, Wellcome is entirely exculpated by the necessary conclusion from the evidence that there has been a conspiracy which implicates others in grievous crimes. It must be laid down as a reiteration of our former decision that a lawyer who is guilty of willful bribery of members of

the legislature is unworthy of the honors and responsibilities accompanying the office of an attorney and counselor at law; and if, after fair, impartial, and searching investigation, a lawyer be clearly proven guilty of such an offense, it is due to the profession, and to the courts of which he is an officer, and to the state, that his license to practice be revoked, or that he be suspended from the performance of the duties of his high office for a stated period of time. Lord Chief Justice Cockburn, in *In re Hill*, L. R. 3 Q. B. 543, said: "When an attorney does that which involves dishonesty, it is for the interest of the suitors that the court should interpose and prevent a man guilty of such misconduct from acting as attorney of the court. * * * I should add, there is one consideration I omitted, and which I think is entitled to great weight. It is that put to us in the course of the discussion, namely, that if these facts had been brought to our knowledge upon the application for this gentleman's admission, we might have refused to admit him; and I think the fact of his having been admitted does not alter his position. Having been admitted, we must deal with him as if he were now applying for admission; and as, in the case of a person applying for admission as an attorney, we should have considered all the circumstances, and either have refused to admit or have suspended the admission for a certain time, so, where a person has once been admitted, we are bound, although he was not acting in the precise character of an attorney, to take notice of his misconduct."

In line with the view of the English judges is the following argument of Chief Justice Whipple in *In re Mills*, 1 Mich. 394, where he said: "If our courts are restricted to the causes set forth in the statute, there would seem to be a lamentable defect in our laws. The words 'deceit' and 'malpractice' in the statute have direct reference to the conduct of an attorney, as such attorney; and, if the authority of our courts to remove or suspend an attorney is to be thus restricted to *official* delinquencies, it follows that, however degraded his moral character may be,—whatever fraud or deception he may

be guilty of,—if such fraud or deception is unconnected with his *professional* acts, he is deemed worthy of a place at the bar. In other words, an individual may be guilty of acts which involve a violation of every moral precept, and yet retain our license and practice in our courts, provided these acts were committed in his *private*, and not *official*, capacity. If it is of consequence to the community that those who are in any way concerned in the administration of justice should possess a reputation unstained by those vices which in their nature tend to degrade and corrupt, then is it important that a power should be lodged in some tribunal to purge the bar of such as may have become the victims of such vices. That no person can faithfully and honorably discharge the delicate and responsible duties of an attorney, unless fortified by strong moral principles, is too clear for argument. The *nature* of those duties necessarily implies the possession of high moral character, in order to their conscientious performance. This our statute contemplates, for it is only those who are 'approved by the court for their good character' who are permitted to wear the honors and bear the responsibilities of an attorney. If it be necessary, to gain admission to the bar, that a person should furnish the evidence of 'moral character,' as required by the twenty-seventh section, how infinitely greater the necessity that he should actually possess that character when he shall have entered upon the active and exciting theater of professional life, where he is beset at every moment by temptations well calculated to test the firmness of his principles." See, also, *Baker v. Com.*, 10 Bush 592; *Smith v. State*, 9 Tenn. 1 Yerg. 228; *State v. McClagherty*, 33 W. Va. 250, 10 S. E. 407; *In re Blake*, 3 El. & El. 33; *In re O——*, 73 Wis. 602, 42 N. W. 221.

It is not necessary that, as a condition precedent to the exercise of the jurisdiction of this Court in a disbarment proceeding, repeated efforts be made to secure an indictment for crime. Nor will we hold that it is requisite that the attorney general appeal several times to one judge, or one time to several judges, to impanel a grand jury to investigate

charges of bribery, where there has been an investigation into the very charges which are made the foundation for disbarment proceedings by a grand jury duly impaneled under the forms of law, and specially directed to inquire into the truth of such charges.

We did not hold, and we shall not now decide, that unusual and extraordinary procedure be invoked under the Criminal Code before our jurisdiction will be exercised. It is disclosed by this record that the ordinary and usual forms of the criminal practice and procedure were pursued, by the investigation had by the grand jury called by Judge McIntire. This, we believe, was enough to justify the institution of proceedings in the Supreme Court. But, if it were necessary that further steps should have been taken, it affirmatively appears that they were pursued in this matter; for it was a somewhat unusual and extraordinary course that the attorney general adopted when he made his statement to the district court to the effect that there ought to have been an indictment for some crime, in the light of the evidence before the grand jury, and when he requested the court to impanel another, to the end that there might be a resubmission or re-examination into the charge.

Nor should our discretion be turned against hearing this matter because no further steps under the Criminal Code have been taken since the request for another grand jury was denied. Whatever argument can be fairly deduced from the inaction of counsel for the state since the grand jury made its report tends to lend additional support to the strength of the reasons why, in the light of the showing, this court should proceed at this time, for it would seem improbable that any criminal action will be had. This is not a criminal prosecution, nor an aid to a criminal investigation (*Jackson v. State*, 21 Tex. 668; *Case of Austin*, 5 Rawle 191), but is to ascertain if the accused is worthy of the confidence and is possessed of that good moral character which is a condition precedent to the privilege of practicing law, and of continuing in the practice thereof. The case is extraordinary,—without par-

allel, so far as we are advised; but, as it is presented at this time, we conceive our duty to be to order the accused to answer the charges, and to require him to do so within 10 days from now.

The form of the verification of the petition is as follows:

“Fred. Whiteside, being first duly sworn, upon oath deposes and says, that he has read carefully the foregoing accusation against John B. Wellcome, and that the charges therein contained are true, except in those instances where the allegations are made upon the best information and belief of affiant; and as to such allegations thus made, he believes them to be true.

FRED. WHITESIDE.”

It is said that this form is insufficient, under Section 420 of the Code of Civil Procedure, which provides, “The accusation must state the matters charged, and be verified by the oath of some person to the effect that the charges therein contained are true.” The objection of the accused is aimed at the entire accusation, and is clearly too broad, inasmuch as portions of the accusation consist of allegations positively made. It must therefore be overruled.

The court expresses the opinion that a more correct conclusion can be reached in the case by the justices hearing the testimony themselves, if it shall come to a hearing at all. The court will hereafter set a time for further proceeding.

CASES DETERMINED

IN THE

SUPREME COURT

AT THE

OCTOBER TERM, 1899.

PRESENT:

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. WILLIAM H. HUNT, }
THE HON. WILLIAM T. PIGOTT, } Associate Justices.

HILBURN, COUNTY TREASURER, RESPONDENT, v. ST.
PAUL, M. & M. RAILWAY CO. ET AL.,
APPELLANTS.

23	229
124	228
23	229
125	161

[No. 1,360.]

[Submitted June 28, 1899. Decided October 9, 1899.]

*Taxation—School Taxes—Submission to Voters—Statutes—
Conflicting Provisions—Statutory Construction—Interpretation.*

1. Courts will sustain the acts of the legislature in every case in which it is possible to do so under the recognized rules of interpretation. It is only where, after an act of the legislature has been subjected to the test of all the standards of interpretation,

the intention cannot be discerned, or the means of carrying it out are not provided or are inadequate, or it is so conflicting and inconsistent in its provisions that it cannot be executed, that it will be declared inoperative and void.

2. Political Code, Section 1940, as amended by Act of March 8, 1897, and numbered as Section 1940 b, providing for the submission to the voters of the district of the question whether school taxes, not to exceed 10 mills on the dollar, should be levied, which requires a notice stating the amount to be raised, but which does not provide for a determination of such amount, before the submission of the question, and which provides, in mandatory terms, for a form by ballot in which the rate, but not the amount, is to be inserted, is inoperative and void, since it contains conflicting provisions, with no means of carrying either into execution.
3. Under Political Code, Section 5162, providing that, if the provisions of any title therein conflict with the provisions of any other title, the provisions of each title must prevail as to all matters and questions arising out of the subject-matter of such title, Section 1940, as amended by Act of March 8, 1897, and numbered as Section 1940b, contained in Title III, relating exclusively to "Education," which provides for the levy of school taxes on a different basis of taxation than that provided for other taxes in Sections 3670-4083, in Title X, relating to "Revenue," but which contains no provision for the collection of the tax, or by which the roll on which such tax is computed can get upon the regular assessment roll of the county, provided for in Title X, is inoperative and void.

ON MOTION FOR REHEARING.

[Decided October 30, 1899.]

1. The rule, in construing statutes, that, where it is manifest on the face of the act that an error has been made in the use of the words, the court may correct it, and read the statute as corrected, to give it the obvious intent of the legislature, does not justify the court in reading such a change into a statute as that the effect will be to abrogate a specific provision made therein.
2. It is the rule in regard to special taxes, that the various steps provided by law to be taken in laying them must be observed; and the record of the proceedings must show that the provisions of the law have been complied with.
3. The rules of construction: "That the contemporaneous and long-continued practice of officers required to execute or take special cognizance of a statute is strong evidence of its true meaning," and that, "if the legislature, by its inaction, has long sanctioned a certain construction, language apparently unambiguous may be given by the court such construction, especially if the usage has been public and authoritative," are only applicable in a condition of things where vested rights have been acquired, and where for many years the construction insisted upon has been the rule of action; and to disturb it would be to work great public and private injury and inconvenience. They are inapplicable in a case where the practice has not become inveterate, and the terms of the statute are both ambiguous and conflicting with each other and with other provisions of law which they cannot be held to amend or repeal.

Appeal from District Court, Flathead County; D. F. Smith, Judge.

ACTION by Samuel Hilburn, as county treasurer of Flathead county, Mont., against the St. Paul, Minneapolis & Manitoba Railway Company and Great Northern Railway Company. There was a judgment for plaintiff, and defendants appealed. Reversed.

STATEMENT OF THE CASE.

Action by the plaintiff, as county treasurer of Flathead

county, to foreclose a lien claimed on account of special taxes levied in school districts Nos. 6, 17, 19, 21, 23, 26, and 15, in Flathead county, for the year 1897. The complaint sets forth seven separate causes of action. In the first cause of action, after setting forth the official character of the plaintiff and the corporate character of the defendants, it proceeds to allege substantially as follows: That on the first Monday of March, 1897, and during all that day, the defendant the St. Paul, Minneapolis & Manitoba Railway Company was the owner of 197.5 miles of roadbed, roadway, rails, and certain rolling stock, the assessed valuation of which was fixed for the year 1897 by the state board of equalization of the state of Montana, at the time and in the manner provided by law, at \$4,600.00 per mile; that on the second Monday of September, 1897, the board of commissioners of Flathead county caused to be entered in the proceedings of said board an order stating and declaring the number of miles of said railroad in school district No. 6 of said county to be 62.65 miles, at the assessed value aforesaid of \$4,600.00 per mile; that the defendant the Great Northern Railway Company, on the first Monday of March, 1897, and during all that day, was the lessee of the above-described property belonging to its co-defendant railway company, and during all of said day was in control of said line of railway and rolling stock, and operating the same; that at the same time it, the Great Northern Railway Company, was the owner of certain depots, section houses, water tanks, tool houses, and other property located in said Flathead county upon the right of way of its said co-defendant, and upon the line of the Great Northern Railway, a particular description of which is shown by the return of said Great Northern Railway Company for the year 1897 to the county assessor of said county, and attached to and made a part of the complaint as Exhibit A.; that at all times mentioned herein school district No. 6 of Flathead county was, and is now, a duly and regularly created and organized school district of said county, with a board of trustees consisting of three members; that at a regularly called special meeting of

the board of trustees of said district, held at the school house therein, on the 15th day of March, 1897, certain proceedings were had by the said board, as shown by its records, as follows: "The board voted to submit to the qualified voters of this district the levy of a special tax of \$2,000.00 to maintain schools, to be voted on at the next school election, April 3, 1897"; that at said meeting the purpose for which said money was to be used, if voted, was discussed by the said board, and that said money was to be raised for the purpose of paying salaries of teachers of the schools of said school district, and for furnishing other additional school facilities; that the trustees at said meeting understood and intended the words "to maintain schools" to cover and include, and said words did cover and include, the purpose of raising money to pay the salaries of teachers and furnish other school facilities; and that, in pursuance of said action of the board of trustees to submit the question aforesaid to an election of the qualified voters of said district, such election was called by posting notices in three public places in said district for a period of time more than 15 days before the day of election, a copy of which notice is as follows:

"NOTICE OF ELECTION.

"The annual meeting of school district No. 6, Flathead county, for the purpose of electing one trustee, and submitting to the qualified electors of the district the question whether a tax of \$2,000.00 (dollars) shall be raised for maintaining school in said district, will be held on Saturday, April 3, 1897, at the district school house. The polls will be open between the hours of 2 and 6 P. M.

"C. H. SELVAGE,

"C. S. GARRETT,

"JOHN HALL,

"Trustees.

"C. F. SULLY, Clerk District No. 6.

"Dated March 15, 1897."

It is further alleged that the words "for maintaining school" in said notice were understood and intended by said

board of trustees to cover and include, and the said words did cover and include, the purpose of raising money to pay the salaries of teachers and furnish other school facilities; that the said election was held at the district school house in said district on the 3d day of April, 1897, and that at said election 117 legal votes were cast for "Tax, Yes," and 4 votes for "Tax, No"; that the officers of said election thereupon certified to J. B. Gibson, the assessor of Flathead county, the fact that a majority of the votes cast at said election were for "Tax, Yes"; that said J. B. Gibson, as assessor, thereupon copied from the last assessment roll of said county the list of property liable to taxation situated in or owned by residents of said school district, and delivered the same to the board of trustees of said school district; that said list included the taxable property of said defendants in said district situated therein on the first Monday of March, 1897, viz: As belonging to the St. Paul, Minneapolis and Manitoba Railway Company, Great Northern Railway Company, lessee: franchise, roadbed, rails, and rolling stock, 62.65 miles, assessed at \$4,600.00 per mile, making a total valuation of \$288,190.00; as belonging to the Great Northern Railway Company; buildings, turntables, water tanks, tool houses and coal docks at Summit, Bear Creek, Java, Essex, Paolo, Nyack, Belton, Coram, and Columbia Falls stations, assessed for the year 1897 at a valuation of \$12,675.00; and that the total valuation of the taxable property of said defendants in said school district for the year 1897 was \$300,865.00; that the board of trustees of said school district, upon receiving the assessment roll aforesaid from the county assessor, gave five days' notice thereof by posting a notice in three public places in said district, and sat for one day as a board of equalization at the school house in said district on the 16th day of August, 1897, for the purpose of equalizing the property in said district; that the said board of trustees, upon receiving from the assessor the said list of property, deducted 10 per centum therefrom for anticipated delinquencies, and divided the \$2,000.00, the sum voted as stated in said notice of election, by the amount stated

in said list, less the 10 per centum deducted, and from such division ascertained that the rate per centum required was six mills on each dollar of the taxable property in said district; that the special school levy in said district for the year 1897 was then and there fixed at six mills on each dollar of the taxable property; that, as soon as they had ascertained the rate of taxation to be six mills on each dollar as aforesaid, the board certified the same to Michel Therriault, the county clerk of said Flathead county, who extended the same on the general assessment roll of said county for the year 1897, and certified the same to Samuel Hilburn, the plaintiff herein, as treasurer, for collection; that the amount of taxes so extended for the year 1897 against the property of the defendant the St. Paul, Minneapolis & Manitoba Railway Company, the Great Northern Railway Company, lessee, was \$1,729.14, and the amount of taxes so extended against the property of the defendant Great Northern Railway Company was \$76.05; that said special taxes for the year 1897 were not paid, but became delinquent; that thereupon the plaintiff, as county treasurer, published in the delinquent list, as required by law and in the manner provided, the names of the said defendants, and a description of the property owned and controlled by them in said school district No 6, together with a notice that, unless the taxes delinquent, with the costs and percentages, should be paid, the real property on which said taxes were a lien would be sold at public auction in front of the county treasurer's office on the 17th day of January, 1898; that the cost of said publication was one dollar; that thereafter, on January 10, 1898, the defendants, by their attorney and agent, A. J. Shores, filed a written protest with the treasurer, protesting against such sale, claiming that the assessment of said special school taxes was void, and specifying the grounds upon which said claim was founded; that thereupon the said county treasurer withdrew the said property from sale, and reported the case to the board of commissioners of said county, for its direction in the premises; that thereafter, and before the commencement of this suit, the said board of

commissioners directed the foreclosure of the lien of said tax by action; that no part of said taxes levied as aforesaid, amounting to \$1,805.19, has been paid, and the same are now due and owing, together with 10 per centum penalty upon the said sum added for the nonpayment thereof, and 12 per centum interest thereon from the first Monday of December, 1897, with costs of collection, including one dollar for advertising and 10 per centum for attorney's fees.

The allegations set forth in the other causes of action are substantially the same as in the first cause of action. They are therefore omitted from this statement.

Judgment is demanded by plaintiff for the amounts alleged to be due and delinquent on account of the levies in the various districts, with penalties, interest and costs, including attorney's fees, and a foreclosure of the lien under the statute upon the property mentioned in the complaint. Defendants interposed a general demurrer to each cause of action. After argument, the trial court sustained the demurrer to the sixth and seventh causes of action, and overruled it as to the others. The defendants declined to plead further, judgment was thereupon rendered against them personally upon the first, second, third, fourth and fifth causes of action, and execution awarded thereon against their joint property, no provision being made for the sale of any specific property to satisfy the lien. From this judgment defendants have prosecuted their appeal to this court.

Mr. A. J. Shores, for Appellants.

Mr. C. B. Nolan, Attorney General, for Respondent.

MR. CHIEF JUSTICE BRANTLY, after stating the case, delivered the opinion of the court.

The contention is made by appellants that the statute under which the elections were held in the various districts is not capable of being executed, and that, therefore, no valid assessment can be made thereunder. If this contention is sus-

tained, the result will be, not only that the taxes involved herein will be declared invalid, but also that no school district in the state can hereafter vote any special tax, in aid of its own schools, until new legislation be enacted granting the power and providing a method by which it may be done; for the statute in question contains the only provision we have on the subject. The parts of it pertinent to this inquiry are Section 1940 of the Political Code, as amended by an act of the legislative assembly approved March 8, 1897, and numbered as Section 1940b (Session Laws of 1897, page 134), and Section 1941, which follow:

“The board of trustees of any district may at any time when in their judgment it is advisable submit to the qualified electors of the district the question whether a tax not to exceed ten mills on each dollar on the taxable property in the district shall be raised to purchase lots and to furnish additional school facilities for said district or for building one or more school houses, or for removing or building additions to one already built, for the purchase of globes, maps, charts, books of reference and other appliances or apparatus for teaching, or for any or all of these purposes. Such election shall be called by posting notices in three public places in the district for at least fifteen days before the election and by publishing for at least one time in some newspaper published in the county in which the said district is located a notice of such election, provided that this shall apply only to districts containing a school board of more than three trustees and conducted as nearly as practicable according to the provisions herein made for holding annual school elections. The notice shall contain the time and place of holding the election, the amount of moneys proposed to be raised and the purpose or purposes for which it is intended to be used. At such elections the ballot shall be in form as follows: ‘Shall a tax not to exceed — mills be raised to furnish additional school facilities for said district or for building a school house or for improving a school house or for building additions to one already built, as the case may be.

“ ‘Tax, Yes.

“ ‘Tax, No.’

“The elector shall prepare his ballot by crossing out thereon parts of the ballot in such a manner that the remaining part shall express his vote upon the questions submitted. If a majority of the votes cast are ‘Tax, Yes,’ the officers of the election shall certify the fact to the assessor of the county, who shall at once proceed to copy from the last assessment roll of the county assessor the list of property liable to taxation, situated in or owned by residents of his district, and shall deliver the same to the board of trustees, who shall allow him therefor out of the proceeds of said tax two dollars per day. The trustees shall upon receiving the roll, deduct ten per centum therefrom for anticipated delinquencies, and then by dividing the sum voted, together with the estimated cost of assessing and collecting added thereto, by the remainder of the roll, ascertain the rate per centum required and the rate so ascertained (using the full cent on each one hundred dollars in the place of any fraction) shall be and is hereby levied and assessed to, on or against the persons or property named or described in said roll; and it shall be a lien on all such property until the tax is paid and said tax if not paid within the time limited within the next section for its payment shall be recovered by suit in the same manner and with the same costs as delinquent state and county taxes. The trustees upon receiving any assessment roll from the assessor shall give five days’ notice thereof by posting a notice in three public places in the district and shall sit for at least one day as a board of equalization at such time and place as shall have been named in said posted notices; and they shall have the same power as county boards of equalization to make any change in said assessment roll.” (Section 1940 b.)

“As soon as the rate of taxation has been determined, as provided in the last preceding section, the trustees shall certify the same to the county clerk, who shall extend the same upon the general assessment roll of the county, and certify the same to the county treasurer, who shall proceed to collect

the tax in the same manner and at the same time, and with the same power and authority to enforce the payment of the same, as in the case of the county and state taxes. The county treasurer shall place any tax so collected to the credit of the district to which it belongs." (Section 1941.)

The act of which section 1940b is a part was passed during the closing days of the session of the legislature, and, as Justice Pigott well says of it in *State ex rel. Knight v. Cave*, 20 Mont. 468, 52 Pac. 200, "presents an example of the careless legislation which is common, and which the courts are continually called upon to interpret or construe." It is nevertheless an expression of the legislative will on the subject under consideration, and must be executed, if its intention can be discerned and it is possible to carry it out as directed. It is fundamental that the courts will sustain the acts of the legislature in every case in which it is possible to do so under the recognized rules of interpretation. It is only where, after the measure in question has been subjected to the test of all the standards of interpretation, the intention cannot be discerned, or the means of carrying it out are not provided, or are inadequate, that it will be declared inoperative and void. A brief review of the history of the sections under consideration will be helpful. Section 1940b was brought forward from the Compiled Statutes of 1887 (Fifth Division, Section 1905) as part of an act approved March 11, 1895, and adopted as a part of the Political Code of 1895. It appears in that Code as the latter part of section 1940. In course of the transfer into the Code, a change was made in the requirement as to the form of question to be submitted to the voters by the trustees. Under the older statute, the trustees were required to determine the amount of money desired, and after notice, the same in form as that required by section 1940b, the voter indicated his desire by voting "Yes" or "No" as to this amount. In case of a favorable vote, the method of determining the rate was the same as is now provided. In section 1940, *supra*, the question to be submitted to the voter is

whether a tax not to exceed ten mills upon each dollar of taxable property in the district shall be raised. The form of the ballot is prescribed, and is, "Shall a tax not to exceed — mills be raised, etc.," the purposes named in both acts being the same, except that the additional purpose "to purchase lots" is inserted in the new section. The work of obtaining the assessment roll under the old act was done by the district clerk. Under the act of 1895 this is enjoined upon the county assessor. By an oversight in the drafting of the act of 1895, the words, "the board of trustees of any district," were omitted, and this defect appeared in the act as it was approved; so that, there being no subject for the following verb "submit," no person was expressly authorized to submit the question to the voters. This section was therefore thought to be inoperative, and to cure this defect, it was amended by the act of 1897. There was then added section 1940a, which contains provisions for the raising of funds for ordinary school purposes. Section 1940b is the same as the latter part of section 1940, except that the words, "the board of trustees of any district," were inserted, and the words, "or to maintain any school or schools in such district," were omitted from the enumeration of purposes for which a special tax could be voted. From this brief statement it can be readily seen that, under the provisions of the section under consideration, as it stood in the Compiled Statutes, no limit was fixed beyond which the trustees could not go in determining the amount of money needed or to restrain the voters in giving their consent. In the transfer of the provision to the Code of 1895, an attempt was made to impose a limit in both these particulars. The intention to do this is manifested by the form of resolution to be determined upon by the board in its deliberations, and also by the form of ballot required. The notice required by the old provision remains the same in the new, but it is not in conformity with the theory of the provisions just mentioned. It does conform, however, to the theory of the old statute, which makes the rate as found thereunder mandatory. The rate, under the theory of the other

provisions of the new act, was evidently designed to be fixed by the board upon considering the matter further at a time subsequent to the date of the election; for these provisions cannot be construed to contemplate any other method of fixing the rate. In any event, they are inconsistent with the provision for fixing the rate as it now stands, because they do not furnish any dividend into which the sum or amount of the taxable property in the district may be caused to enter in order to find the quotient rate. No amount is voted which can be used as such dividend. The vote must be upon the limit. If it be said that the terms "amount" and "rate" refer to the same thing, and that the board in the resolution adopted should fix the amount as well as the rate, and insert the rate also in the notice, a conclusive answer is that the words have totally different significations. The former means "a sum or total,—the aggregate"; while the latter means "a fixed measure of estimation." These are clearly the significations given to these terms as used in the statute. Putting the rate limit in the notice would not avoid the difficulty, because the voter would still not vote upon the amount. The amount could not be inserted in the ballot, because that would not be permissible, the statute using mandatory terms in providing for the form of this. We therefore have in this section of the statute, the manifest intention of which is to authorize school districts to levy special taxes for school purposes, two conflicting theories, with no means provided sufficient or adequate to carry either into execution. We are therefore constrained to the conclusion that it is inoperative and void. As stated in the foregoing part of this opinion, we are mindful of the rule that the courts must endeavor to so interpret a statute that it will stand. We are also mindful of another requirement, none the less binding upon us, that we cannot usurp the power appertaining to the legislature, a co-ordinate branch of the government, and legislate, where it has not done so. As the court well said in *State v. Partlow*, 91 N. C. 550: "A statute must be capable of construction and interpretation; otherwise, it will be inoperative and void. The court must

use every authorized means to ascertain and give it an intelligible meaning; but if, after such effort, it is found to be impossible to solve the doubt and dispel the obscurity, if no judicial certainty can be settled upon as to the meaning, the court is not at liberty to supply—to make—one. The court may not allow conjectural interpretation to usurp the place of judicial exposition. There must be a competent and efficient expression of the legislative will.”

So, if an act of the legislature is so vague and uncertain in its terms as to convey no meaning; or if the means for carrying out its provisions are not adequate or effective; or if it is so conflicting and inconsistent in its provisions that it cannot be executed, it is incumbent upon the courts to declare it void and inoperative. (*State v. Partlow, supra*; *Chaffee's Appeal*, 56 Mich. 244, 22 N. W. 871; *Ward v. Ward*, 37 Tex. 389; *Drake v. Drake* (4 Devereaux's Law), 15 N. C. 110; *Hughes' Case*, 1 Bland 46; *In re Hendricks* (Kan. Sup.), 57 Pac. 965; *Farmers' Bank v. Hale et al.*, 59 N. Y. 53; *Pillow v. Gaines*, 3 Lea 466; *Suth. St. Const. Sec. 220.*)

There is still another cogent reason why Section 1940b is inoperative. The evident meaning of Section 1941 is that, after the rate has been fixed as provided in 1940b, not only the rate, but also the roll, prepared and equalized by the trustees, must be certified to the county clerk for extension upon the general tax roll of the county for collection by the treasurer. The word “same,” as used in the latter section, evidently refers to the equalized roll as well as to the rate; otherwise, the work of the board, sitting for the purposes of equalization, would be nugatory, and, the rate only being certified, the basis of taxation to which the rate would be applied would be different from that upon which it was computed. We cannot suppose that the legislature intended that the rate should be computed upon one valuation, and the tax collected upon another. And yet this would be the case if the rate only were to be certified, for the mandate of Section 1940b, *supra*, is that the last assessment roll must be used; that is, presumably, the one of the previous year. That this

was not the intention of the legislature is made clear by reference to the following language in Section 1940b: "And the rate so ascertained * * * shall be and is hereby levied and assessed to, on or against the persons or property named or described in said roll, and it shall be a lien on all such property until the tax is paid." The Political Code of 1895, as reported by the code commission, contained a scheme for assessment, equalization, levy, and collection of taxes complete in itself, which was designed to be, and is, available for all taxing purposes for the state, county, and subdivisions of counties. This plan or scheme was adopted with the Code practically as it was reported, and constitutes Title X, Part III of the Political Code relating to revenue (Sections 3670-4083). The fundamental idea of this scheme or plan is that there must be one tax roll for all purposes, and that the board of county commissioners must levy all taxes for the county and its subdivisions, except incorporated cities and towns which have ordinances providing for the assessment and collection of their own taxes. To carry out this idea, the contents of the assessment roll are prescribed, so that the situation of all property in any subdivision of the county appears thereon (Section 3724). When this roll has been completed for the county, it is equalized by the board of county commissioners for the county, and, with the rolls of other counties, by the state board of equalization. There is then added the proportion belonging to each county of the assessment made by the state board of equalization upon railroads operated in more than one county, and upon mortgages upon property situated in two or more counties. This last item is apportioned by the commissioners among the subdivisions of the county. Thus, the roll is completed (Sections 3738-3809), and is the only basis of taxation for the county, or any subdivision thereof, with the exception of cities and towns, as noted (Section 3743). The levy is then made by the county commissioners for all county purposes. In perfect conformity with this scheme, the code commissioners, in their draft of the Code, presented a chapter with provisions for levying and

collecting special taxes for school districts. The method of submitting the question of a special tax to the voters was the same as that provided in the Compiled Statutes (Section 1905, *supra*). After the amount was voted, this was to be certified to the county commissioners before the final levy for the county was to be made. This board was thereupon to determine the rate by summing up the property belonging to the particular district as it appeared upon the roll for the current year, and using this as a divisor for the dividend furnished by the amount certified by the trustees. The rate thus determined was to be thereupon levied by the commissioners, and the tax extended and collected with other taxes of the county. Had these provisions been adopted, there would have been a plain and easy method provided for the levying and collection of these taxes, entirely consistent with the title relating to revenue. These provisions are found in Sections 1245-1253 of the Political Code as reported by the code commission. But, as has been noted already, the report of the commission upon this subject was rejected. The act of 1895, *supra*, and the act of 1897, amendatory of this act, are now among our statutes in their stead. These go to make up the provisions of Title III of Part III of the Political Code (Sections 1510-2028) relating to education. This Code (Section 5162) also provides that, if the provisions of any title therein conflict with the provisions of any other title, the provisions of each title must prevail as to all matters and questions arising out of the subject-matter of such title. Now, the acts of 1895 and 1897 deal exclusively with the matters relating to education. They have no reference to the general scheme of revenue provided for in the title relating to revenue. They do not, in terms, change in any way the machinery devised in this title touching assessment, equalization, levying, and collecting taxes. They do not, in themselves, provide a way by which the basis of taxation contemplated by them can get a place upon the assessment roll of the county, so that the tax authorized by the vote of the district can be collected with the other taxes of the county. They are inconsistent with

the provisions of Title X, in that they provide a different basis of taxation; but they may not on this account be construed as amending or repealing, by implication, any of the provisions of that title. They do not purport to amend any portion of it, and, under the rule of construction laid down in Section 5162, *supra*, the provisions of Title X must be allowed to stand, notwithstanding the inconsistent provisions of these acts; for the same rule must be applied to acts amending the different titles of the Code, when they do not refer to the subject-matter of other titles. The county clerk may not, therefore, change the assessment roll provided for by Section 3743, *supra*, nor is he authorized to keep a separate one for each school district, Title X nowhere so providing, and there being no direction to him to do so in Title III. These acts, therefore, not containing in themselves any provisions under which the special tax can be collected, and there being no means provided under Title X by which the roll upon which they are computed can be placed upon the assessment roll of the county, so that the tax may be collected under that title with the other taxes of the county, the means for carrying out the provisions of these acts do not exist at all. To the extent, therefore, of the provisions contained in the sections quoted *supra*, these acts must be held to be inoperative and void.

Section 1940b was considered by this Court in *State ex rel. Knight v. Cave*, *supra*, but the question presented here was not involved in that case. The only question presented there was upon the meaning of the expression "additional school facilities," used among the enumerated purposes for which a tax might be voted.

The judgment of the district court will therefore be reversed, and the cause remanded, with directions to sustain the demurrer.

Reversed and remanded.

MR. JUSTICE HUNT, being absent, took no part in this decision.

ON MOTION FOR REHEARING.

[Decided October 30, 1899.]

PER CURIAM.—Counsel for plaintiff, in his motion for rehearing herein, while admitting that he has no substantial ground upon which to base the application, insists that the importance of the question involved is alone sufficient to justify a re-examination of the case. At the time the original opinion was handed down, we were fully aware of the importance of the case, and of the probably disastrous consequences of the conclusion reached therein to many of the school districts throughout the state. Yet, when confronted with the necessity of a choice between declaring the sections of the statute in question invalid and assuming the functions of the legislature, there was but one course left to us. We could find no other legitimate solution of the matter. Nor are we now, after a further examination of the statute itself and the authorities cited by counsel, able to announce a different conclusion.

1. It is admitted that under the provisions of Section 1940b, Political Code, touching the submission of the question of a tax to the voters of the district, no sum can be voted. But it is urged that by substituting for the words "the sum voted," in the latter part of the section, in the provision directing the trustees how to determine the rate, the words "the sum mentioned in the notice," one of the difficulties in executing the statute will disappear. In support of this suggestion the rule is invoked that, where it is manifest upon the face of an act that an error has been made in the use of words, the court may correct the error, and read the statute as corrected, in order to give effect to the obvious intent of the legislature. It is not uncommon for the courts, in construing statutes, where it is manifest that error has been committed, to make the correction necessary to give them effect. One word or phrase may be read for another. (*Haney v. State*, 34 Ark.

263; *People ex rel. Escott v. Hoffman*, 97 Ill. 234; *Moody v. Stephenson*, 1 Minn. 401 (Gil. 289); *Burch v. Newbury*, 10 N. Y. 374; *Lancaster Co. v. Frey*, 128 Pa. St. 593, 18 Atl. 478.) Words, phrases and clauses may be expanded or restricted in their meaning (Suth. St. Const. Secs. 218, 246) so as to carry out the obvious intent of the legislature. The obvious sense in which words are intended to be understood, and not their abstract force, is to be followed. (*Id.*) Words and phrases may be omitted. (*U. S. v. Stern*, 5 Blatchf. 512, s. c. 27 Fed. Cases, 1310; *State v. Acuff*, 6 Mo. 55; *State v. Beasley*, 5 Mo. 91.) An erroneous description may be corrected. (*Lindsley v. Williams*, 20 N. J. Eq. 93; *Palms v. Shawano Co.*, 61 Wis. 211, 21 N. W. 77; *State ex rel. Agricultural Society v. Timme*, 56 Wis. 423, 14 N. W. 604.) Phrases may be transposed in order that the sentence may be read in its obvious sense, and attributive words be applied to the proper object. (*Babcock v. Goodrich*, 47 Cal. 488; *Matthews v. Commonwealth*, 18 Grat. (Va.) 989.) So the court will adopt any other method to make the law effective, provided the context furnishes the real intent of it, and it is not necessary to add substance to it to make it effective. It may look, also, to statutes in *pari materia*. (Suth. St. Const. Secs. 283-285.) But it must be understood that these rules apply only to cases where the intention is manifest from the context and provisions in *pari materia*, and always with the limitation that, after the correction is made, the means of executing the law are provided for. The court will not add substance where there is no substance, nor will it provide means where the law provided none. And we apprehend that no authority can be found to sustain a court in reading such a change into a statute as that the effect will be to abrogate a specific provision made therein.

We do not think the suggestion made by counsel will avoid the difficulty. The aim of the provision fixing the form of question to be submitted and the ballot to be used is to have the voter authorize the tax, and at the same time to impose a limit upon the burden to be borne for any one year. Can it

be said that when a voter has consented to be taxed specially within certain limits he has consented to the raising of a sum already fixed by the board without reference to a limit, and which the board was not authorized to fix? Or, after he has been notified that he may vote for the sum mentioned in the notice, and undertakes to do so, can he do it by using the prescribed form of ballot? Who is to say that he intended to vote for the sum named in the notice when he does not say so himself. If the suggestion made by counsel can be adopted, why not adopt an expedient more convenient and effective, and make the prescribed form of the ballot read: "Shall a tax of — dollars be raised to furnish" etc? Yet counsel would not contend that this would be lawful. Nor would he contend that it would be lawful for the trustees to fix a sum, instead of using the rate limit, in their preliminary resolution. It is the rule, particularly in regard to special taxes, that the various steps provided by law to be taken in laying them must be observed. "The municipal corporations of a state, having no inherent power to tax, must take such power as is conferred under the conditions and limitations that may be prescribed, and only for such purposes as may be expressed. This is fundamental." (Cooley on Taxation, 329.) The record of the proceedings must show that the provisions of the law have been complied with. "Every essential proceeding in the course of a levy of taxes must appear in some written and permanent form in the record of the bodies authorized to act upon them. Such a thing as a parol levy of taxes is not legally possible under the laws." (Cooley on Taxation, 339; *Moser v. White*, 29 Mich. 59; *Farrar v. Fessenden*, 39 N. H. 268.)

The fundamental idea of the section under consideration is that the voter must give his consent to a tax limited by bounds over which the trustees cannot step even with the voter's consent. After a suitable resolution has been passed by the board, the notice is given, the vote taken, and the record made up. From the record it does not appear that the voter has consented to the tax contemplated by the notice. It

does appear that he has consented that the board may levy a tax not to exceed 10 mills on the dollar, and yet the law leaves no option to the trustees to act upon this theory, but enjoins upon them the duty to proceed to find out the rate by another process, in which their discretion has no place. If it happens to exceed the rate limit, it must still be the rate. They cannot change it. In the meanwhile they are presuming, without any evidence before them to establish the fact, that the voters have consented to what they do.

In our opinion, it is impossible to observe the requirements of the statute, under the rules of construction applicable to it, without making a substantial amendment to it sufficient to carry out one or the other of the theories contemplated by its inconsistent provisions.

2. But, even if we agree with counsel as to the proposed change in the reading of section 1940b, what disposition shall we make of the difficulty touching the tax roll? Section 1941 is a part of the old act, but, reading it in connection with 1940b, it is perfectly apparent that the tax rate, however it may be fixed, is levied upon the roll as equalized by the board. As we showed in the original opinion, this roll must be based upon the valuations of the previous year, and there is no authority of law, either in the title relating to revenue or in that relating to education, to use this roll. In fact, it contravenes the express provisions of the former in this respect, and under the rule of construction laid down by the legislature, itself (Political Code, Section 5162) these must prevail where there is a conflict with other titles. Counsel seeks to avoid this difficulty, however, by invoking other rules of construction, viz: "That the contemporaneous and long-continued practice of officers required to execute or take special cognizance of a statute is strong evidence of its true meaning," and that "if the legislature, by its inaction, has long sanctioned a certain construction, language apparently unambiguous may be given by the court such construction, especially if the usage has been public and authoritative,"—citing, among other authorities: 23 Am. & Eng. Enc. Law, 340,

342, and notes; *Rogers v. Goodwin*, 2 Mass. 477; *U. S. v. Moore*, 95 U. S. 763; *People ex rel. Escott v. Hoffman*, 97 Ill. 234; *Scanlan v. Childs*, 33 Wis. 663; *The Laura*, 114 U. S. 411, 5 Sup. Ct. 881; *U. S. v. Hill*, 120 U. S. 169, 7 Sup. Ct. 510. Under these authorities counsel argues that in view of the inveterate construction which the county treasurers throughout the state must have given to this feature of the act, and especially in view of the acquiescence therein of the legislature, this court should allow it to stand. While the old act stood for many years upon our statute books, it was essentially different from the law as passed in 1895 and amended in 1897. This difference was pointed out in the original opinion. Prior to 1895, the power of the voter was unlimited in consenting to the laying of special school taxes. In the act thus amended a limit was imposed upon this power. Moreover, there was no express provision in the revenue laws touching the basis of taxation, and the legislature had not, prior to that time, laid down the rule of construction to be applied. While, in favor of vested rights and really inveterate practice and procedure, we should be strongly inclined to yield to the *argumentum ab convenienti*, we cannot consider it in face of the conditions here presented. The authorities cited are only applicable in a condition of things where vested rights have been acquired, and where for many years the construction insisted upon has been the rule of action, and to disturb it would be to work great public and private injury and inconvenience. Under the act before us and the other provisions of law to which we must also look, the practice has not become inveterate. This tax was levied for the year 1897,—within two years of the date of the passage of the act. Its terms are not, apparently, unambiguous. They are both ambiguous and conflicting with each other and with other provisions of law which they cannot be held to amend or repeal.

The motion for a rehearing is denied.

Denied.

STATE EX REL. DONYES, PLAINTIFF, v. BOARD OF COMMISSIONERS OF GRANITE COUNTY, DEFENDANT.

[No. 1,452.]

[Submitted July 13, 1899. Decided October 9, 1899.]

Constitutional Law — Statutes — Compensation of Public Officers — County Surveyors.

1. The constitutional provision (Sec. 31, Art. V) prohibiting any law increasing or diminishing the salary or emoluments of a public officer after his election or appointment, does not forbid the legislative assembly imposing upon a public officer additional duties, and (in the absence of a salary designed to cover such services), at the same time allowing him compensation for the performance of such new duties.
2. Appellant was, in November, 1898, elected county surveyor for the term of two years. The legislative assembly, by an act approved March 4, 1897, abolished the office of road supervisor, and imposed the duties of that office upon the county surveyor, and at the same time allowed him compensation for the discharge of such additional duties. On March 3, 1899, the legislative assembly, by an act, repealed the act of March 4, 1897, and re-established the office of road supervisor and stripped appellant of the duties imposed, and deprived him of the compensation allowed therefor, by the act of March 4, 1897. *Held*, that the act of March 3, 1899, does not, as applied to appellant, violate Section 31, Article V, of the Constitution.

ON MOTION FOR REHEARING.

1. The legislative assembly is not prohibited by Section 31, Article V, of the Constitution, from adding duties and providing compensation for them affecting a county surveyor then in office, and thereafter taking away such duties and attendant emoluments from a subsequent surveyor elected before such last act of the legislature was passed.
2. Where an officer is paid by fees or a per diem compensation measured by the services performed and the time employed, his emoluments are not, within the meaning of Section 31 of Article V of the Constitution, diminished by a statute, taking effect after his election, which relieves him of the obligation to perform the duties resting upon him, and destroys the compensation which had theretofore been prescribed for their discharge.

APPLICATION by the state, on the relation of Charles F. Donyes, for a writ of mandamus against the board of commissioners of Granite county, to permit plaintiff to perform his official duties as general superintendent of the public roads of Granite county. Dismissed.

Messrs. Durfee & Brown, Mr. Geo. A. Maywood, and Mr. C. B. Nolan, for Relator.

Mr. Josiah Shull and Mr. W. E. Moore, for Defendant.

MR. JUSTICE PIGOTT delivered the opinion of the court.

The object of this proceeding is to compel, by writ of mandate, the defendant to permit the plaintiff to perform his supposed official duties as general superintendent of the public roads of Granite county. To an alternative writ the defendant has answered by presenting an issue of law. The facts are these: The defendant is the board of commissioners of Granite county,—a county of the eighth class. The plaintiff is the county surveyor elected in November, 1898, for the term of two years, beginning with the first Monday in January, 1899. By virtue of an act of the Fifth legislative assembly entitled "An act to define the powers and duties of county surveyors and to provide for their compensation, and to abolish the office of road supervisor," approved March 4, 1897, he was general superintendent of all roads in the county from the time he entered upon the discharge of the duties of surveyor until March 10, 1899; on that day, conformably to the provisions of an act of the Sixth legislative assembly, approved March 3, 1899, entitled "An act to provide for the election of road supervisors, to define and regulate their powers and duties, to fix their compensation, and to repeal an act entitled 'An act to define the powers and duties of county surveyors and to provide for their compensation, and to abolish the office of road supervisor,' approved March 4, 1897," the defendant divided the county into road districts, and appointed road supervisors, and on April 1st road supervisors were elected in the manner provided for in the act. Since the 10th day of March, 1899, the defendant has excluded the plaintiff from the management, control, and supervision of the highways of the county, and refuses to permit him to perform any of the duties of general superintendent of roads which were imposed upon him by the act of 1897.

Is the plaintiff the general superintendent of the roads in Granite county? If this question be answered in the negative, the proceeding must be dismissed. The answer to the

question will be made when it shall have been determined whether or not that part of the act of 1897 which declares the county surveyor to be the general superintendent of all the roads within his county was repealed by the act of 1899, so as to affect a county surveyor in office at the time of the formal repeal.

The act of 1897 abolished, in terms, the office of road supervisor, and imposed the duties of that office upon the county surveyor, who was made the general superintendent of all roads within his county. His compensation was fixed at the rate of \$5 a day; the total compensation being graduated according to the classification of counties, and not to exceed \$750 in a county of the eighth class. The act of 1899 repealed the act of 1897, and re-established the office of road supervisor. Plaintiff's contention is that so much of the act of 1899 as purports to repeal those provisions of the act of 1897 declaring the surveyor to be the general superintendent of roads, and allowing him compensation for his services as such, is, as to the plaintiff, void, because repugnant to section 31 of Article V. of the Constitution of Montana, ordaining that no law shall increase or diminish the salary or emolument of any public officer after his election or appointment.

We are of the opinion that the theory of the plaintiff is erroneous. By section 5 of Article XVI. of the Constitution, and by section 4312 of the Political Code, the county surveyor is declared to be a public officer, and the limitation upon the powers of the legislative assembly to increase or diminish salaries or emoluments is therefore applicable to statutes affecting his compensation in either of the ways denounced by the organic law; but the question presented is whether the act of 1899 does, within the meaning of the constitutional prohibition, diminish the emoluments of the surveyor. That the legislative assembly might require of the surveyor the performance of additional duties of the same general nature as were those imposed upon him by the statutes in effect at the time of his election, and (in the absence of a salary designed to cover all services that the officer as such might perform)

allow compensation for the discharge of the additional duties, must be admitted; that the right is also inherent in the assembly to enjoin new and different duties of the character described in the act of 1897, and (there being no such salary prescribed) at the same time allow compensation for the performance of them, and that it can do this without violating the constitutional limitation mentioned, must also be admitted. The imposition of the new services and allowance of fees for discharging them, is in no wise obnoxious to the prohibition of the Constitution against the increase or diminution of emolument after election or appointment; in illustration: Prior to the act of 1897, the principal, if not the only, duties of the county surveyor, were to make surveys for courts, counties, and persons, and to perform the labor incident thereto; to furnish plans and specifications for road and bridge work; and to act as chairman of all boards of road viewers. For these services he was paid at the rates specified in sections 2759 and 4639 of the Political Code. New, different, and arduous duties were imposed upon him by the act of 1897; the office of road supervisor was abolished, and the powers and duties theretofore vested in and confided for discharge to him were transferred to the surveyor; some of the labor which until that time had been done by the board of commissioners was likewise cast upon him. By the act of 1897 there was attached to his office a new function,—that of general superintendent of roads, the duties whereof were added to those which rested upon him when he was elected. For these additional services the act of 1897 provided compensation. If it attempted to increase or diminish the rate of compensation for the performance of services which were required of him by the statutes in force when the act was passed, it was to that extent inoperative with respect to a surveyor then in office, because in conflict with the prohibitory provision of the Constitution. In so far, however, as it allowed pay for the discharge of the new duties imposed, the act of 1897 was not obnoxious to the constitutional limitation mentioned. It is a well-settled principle of law that a provis-

ion such as is contained in the Constitution of this state, prohibiting any law increasing or diminishing the salary or emolument of a public officer after his election or appointment, does not forbid the allowance of compensation for new and different services exacted from him during his term, where the statute imposing the duties also prescribes the compensation for their performance. The constitutional limitation in question was intended to apply only to the salary and emolument to which the officer was entitled for services required of him by the law in force at the time of his election or appointment, unless the salary then provided was intended as compensation for all services which the officer, as such, might render. (*Shiffert v. Montgomery Co.*, 12 Montg. Co. Law Rep'r. 100, S. C. 5 Pa. Dist. R. 570. See also, *State v. Carson*, 6 Wash. 250, 33 Pac. 428; *San Luis Obispo Co. v. Felts*, 104 Cal. 60, 37 Pac. 780.) The office of road supervisor is one of legislative, not constitutional, creation; it may be established and abolished at the pleasure of the legislative assembly. In abolishing the office of supervisor and transferring its duties to the county surveyor, the legislative assembly was acting within the scope of its power; and when, in 1899, it stripped the county surveyor then in office of the duties imposed, and deprived him of the compensation allowed therefor, by the act of 1897, it was still within the bounds of its authority, and did not diminish the salary or emolument of the plaintiff as general superintendent of roads. He has been relieved of the burden of rendering certain services exacted by a former statute which fixed a rate of compensation; the gross receipts of his office may be diminished by the act of 1899, but the emoluments of the plaintiff as an officer have not been, and will not be, diminished, within the meaning of the Constitution. "The rule is the same first and last; i. e. a certain sum for a certain service—compensation in proportion to duty—the very rule which it was the design of the Constitution to establish." (*San Luis Obispo Co. v. Felts*, *supra*.) The act of March 3, 1899, is not subject to the specific objection urged against its validity. The plaintiff ceased

to be the general superintendent of the roads in Granite county on the 10th day of March, 1899.

The defendant attacks the act of March 4, 1897, upon the grounds that the title of the act, as well as the act itself, contains two subjects, that the title does not clearly express the subjects, and that Section 16 seeks to extend and apply the provisions of a statute which the act itself attempts to repeal, and to extend, make applicable, revise, and amend a portion of the Political Code without publishing it at length. The views already expressed suffice to dispose of this proceeding upon the merits, and we therefore decline to consider other questions.

Let a judgment be entered against the plaintiff and in favor of the defendant, dismissing the application, with costs.

Dismissed.

MR. JUSTICE HUNT, being absent, took no part in this decision.

ON MOTION FOR REHEARING.

[Submitted October 12, 1899. Decided October 16, 1899.]

MR. JUSTICE PIGOTT delivered the opinion of the Court.

Upon this motion for a rehearing the learned attorney general insists that the opinion heretofore delivered fails to note or consider a question which, although not discussed at the bar, is now asserted to be of vital importance. The point now earnestly pressed is that, when the plaintiff was elected, the ordinary duties of his office consisted of those imposed by the act of 1897 and by the Political Code; that at the time of his election and induction into office he was required to perform the duties enjoined, and was entitled to compensation prescribed by the act of 1897; that, although the act of 1897 imposed upon the surveyor then in office new and additional duties, and allowed compensation for their performance, yet the act did not have such effect upon the plaintiff, he having

been elected while the act of 1897, was operative; and that, therefore, the act of 1899, in so far as it purports to repeal those portions of the act of 1897 imposing duties and allowing compensation for them, is, as to the plaintiff, in conflict with the constitutional prohibition against any law increasing or diminishing the salary or emoluments of a public officer after his election. It is contended that in the former opinion the Court erroneously applied to the plaintiff the rule applicable to a surveyor whose compensated duties might, after his election, have been augmented by the act of 1897, and then diminished during the same term of office by an act similar to the one of 1899. It is conceded that the act of 1897, in so far as it attached to the office duties not, at the time of its passage, pertaining to the office, and allowed compensation for their performance, was not repugnant to Section 31 of Article V of the Constitution; the concession is also made that, if the act of 1899, which repealed the act of 1897, had gone into effect while the surveyor whose duties were enlarged by the repealed acts was still serving his term, it would not be in conflict with the constitutional provision invoked. Counsel argue that it is within the authority of the legislative assembly to impose new duties upon the surveyor after his election, and fix a compensation therefor, and that it may, without violating the constitutional limitation in question, relieve the surveyor still remaining in office from the discharge of duties imposed, and deprive him of the compensation allowed, by the former statute. Counsel advance the view that the legislative assembly, after adding duties and providing compensation for them affecting the surveyor then in office, may not take away such duties and attendant emoluments from a subsequent surveyor, unless it be done before the election of such successor,—in other words, that the surveyor is entitled to discharge the duties and receive the fees which are prescribed and allowed at the time of his election, and that a statute purporting to curtail such duties, or to relieve him of some of them, is a law diminishing his emolument after his election. We are unable to approve of the distinction attempted to be

drawn. The office of county surveyor was created by the Constitution, but his duties and emoluments are matters entirely within legislative control, subject to the prohibition of the fundamental law against the increasing or diminishing of his salary or emolument after his election. The legislative assembly may, from time to time, increase or lessen the duties required to be performed by the officer; it may allow compensation for the added duties; it may also lessen the duties, and deprive him of the emoluments attendant upon the performance of the duties of which he is relieved. Of course, if at the time of his election the statute prescribed a certain salary, designed to cover all services that the officer as such might perform, then it is not within the competency of the legislative assembly to increase such salary nor to diminish it while the obligation still rests upon the officer to perform all or any of the services enjoined upon him at the time of his election. Where, however, the statute in force at the time the surveyor was elected exacted from him the discharge of certain duties for which certain fees were allowed,—as in the case at bar,—the legislative assembly may at any time relieve him of the duties, and deprive him of the compensation allowed; for it is not the intention of the Constitution to prohibit a lessening of the duties of such officer as the county surveyor after his election, even though the effect be to curtail or lessen his total income. Where such officer is paid by fees or a per diem compensation measured by the services performed and the time employed, his emoluments are not, within the meaning of Section 31 of Article V. of the Constitution, diminished by a statute, taking effect after his election, which relieves him of the obligation to perform the duties resting upon him, and destroys the compensation which had theretofore been prescribed for their discharge. The supreme court of Kentucky, in *Purnell et al. v. Mann et al.*,—decided on December 10, 1898, and reported in 48 S. W. 407,—had before it a question identical with the one presented in this case. A statute was enacted in March, 1898, which took away from the county judges, clerks and sheriffs in office at the time

it was passed certain compensated duties, which, under the laws in force at the time of their election, they were required to discharge; and it was contended that the statute was violative of a constitutional provision similar to Section 31 of Article V, for the reason that in depriving those officers of the fees allowed at the time of their election for the performance of the duties then required of them the statute changed their compensation after their election. The court say: "The act does not, as argued, violate section 161 of the constitution, which forbids the compensation of any city, county, town or municipal officer being changed during his term of office; for the duties imposed by the general election law upon the various county officers do not, except in virtue of a repealable statute, pertain at all to several offices; and, of course, when they are, by an amendatory statute, relieved of these duties, their per diem pay ceases without at all involving a change of compensation in the meaning of section 161." Nor is the case of *Bright v. Stone*, decided by the same court, and reported in 43 S. W. 207, in conflict with the Purnell case, for in the former case the point decided was, as we understand it, that a statute enacted during the term of office of a circuit clerk, by which he was allowed fees for performing certain services required of him when he was elected, but not then compensated, was repugnant to the prohibition of the Constitution.

We think a careful reading of the original opinion (the language of which is, perhaps, not as clear as might be desired) will disclose that the decision therein announced is based upon the doctrines here referred to; and that it was not intended to declare that the new duties imposed by the act of 1897 were new, additional, or extraordinary in respect of the plaintiff, who was elected in 1898. Comments upon the fact that the office of road supervisor is a legislative, not constitutional, creation, were indulged in for the purpose of illustrating the power of the legislative assembly to abolish that office, and transfer its duties to the county surveyor.

The motion for a rehearing is denied.

IN RE WELLCOME.

[No. 1,401.]

[Submitted October 17, 1899. Decided October 18, 1899.]

Attorney — Disbarment — Witnesses — Deposition.

23	259
23	408
23	259
26	227

1. A disbarment proceeding is not a criminal prosecution, so as to entitle the respondent to be confronted personally by the witnesses against him, under Constitution Article III, Section 16, providing that a person accused of a crime shall have the right to meet the witnesses against him face to face.
2. Under Code of Civil Procedure, Section 3341, which provides that the testimony of a witness out of the state may be taken in a special proceeding at any time after a question of fact has arisen, a deposition may be taken in disbarment proceedings.

APPLICATION in disbarment proceedings against John B. Wellcome, for commission to take deposition. Commission ordered issued.

Mr. C. B. Nolan, amicus curiæ.

Mr. Wm. Wallace, Jr., Messrs. Carpenter & Carpenter, and Mr. J. B. Roote, for Accused.

PER CURIAM.—The attorney general has applied to this court for the issuance of a commission out of this court, and under the seal thereof, to take the deposition of one James Marshall, residing at Minneapolis, in the state of Minnesota. The accused has filed written objections to the issuance of such a commission upon the ground that the statute does not authorize the proceeding, and because the accused has a right to meet the witnesses against him face to face, and because there is no constitutional power in the court to issue the commission prayed for.

The contention of the accused is that he has a constitutional right to face the witnesses testifying in the case. But a proceeding in disbarment is not a criminal prosecution. This was held in the former opinions filed herein. (*In re Wellcome, ante*, pages 140, 213, 58 Pac. 45, 47.) Section 16, Article III. of the Constitution, relating to the rights of an accused person in a criminal prosecution, is therefore inapplicable.

Section 3341 of the Code of Civil Procedure provides that the testimony of a witness out of the state may be taken by deposition in an action at any time after service of summons or the appearance of the defendant, and in a *special proceeding* at any time after a question of fact has arisen therein. A proceeding of this nature is not an action, that is, it is not an ordinary proceeding in court whereby one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense, as an "action" is defined by section 3471 of the Code of Civil Procedure. Not being an action, it is and must be classified as a special proceeding, for the reason that every remedy sought or administered under the Codes is classified as by action or special proceeding. There is no other place to put a proceeding of this nature, inasmuch as all remedies not embraced in the one class are necessarily within the other. We therefore think that the statutes controlling the taking of depositions in special proceedings are applicable, and that the deposition sought may be taken (*In re Cooper*, 22 N. Y. 67; *State v. Clarke*, 46 Iowa 155.)

Ordered, that the commission issue, directed to the person to be agreed upon by the attorney general and the accused or his counsel.

33	260
123	348

DELOUGHREY, RESPONDENT, v. HINDS, TREASURER,
ET AL., APPELLANTS.

[No. 1,449.]

[Submitted October 5, 1899. Decided October 23, 1899.]

*Taxation — Assessment — Board of Equalization — Equity—
Pleading—Injunction—Stare Decisis.*

1. Under Laws of 1889, page 219, Section 4, which makes it the duty of a taxpayer to furnish the assessor a list of all his property, and Section 5, requiring the assessor to value each lot separately, and Laws of 1887, page 82, Section 22, which provides that any person feeling aggrieved by any assessment may apply to the board of equalization for the correction thereof, equity will not enjoin the sale of separate lots as—

- sessed in gross, for the collection of the taxes thereon, where the complaint does not show that he attempted to have the irregularity corrected by application to the board, or some excuse for not doing so.
2. In an action to restrain by injunction the collection of a tax alleged to have been irregularly and illegally assessed, a complaint which fails to show that plaintiff attempted to have the irregularity complained of corrected by application to the board of equalization, and does not allege any excuse for not doing so, is bad on demurrer.
 3. A court of equity will not grant relief to a taxpayer when the only ground alleged to invoke its aid is an irregularity in the assessment.
 4. Under Laws of 1889, page 219. Section 4, which makes it the duty of a taxpayer to furnish the assessor a list of property owned by him, and Section 5, which makes it the duty of the assessor to assess each lot separately, where the complaint, in an action to enjoin the sale for taxes of one of several separate lots assessed in gross, alleges that complainant is the owner of the lot, but fails to show whether or not the complainant owned all of them at the time the assessment was made, and does not attack the assessment on any ground other than such assessment in gross, it will be presumed that he was either the owner of the several lots when the assessment was made, or that he purchased the lot since the assessment. In the former case he is not entitled to relief, as it is his duty to pay taxes on all the lots; and in the latter he cannot complain, as he took subject to the burdens.
 5. In an action to restrain by injunction the collection of a tax alleged to have been irregularly assessed, a complaint which alleges that plaintiff "is" the owner of the lot in question, but fails to make tender of the amount of taxes admittedly just and due to the county and state, is bad on demurrer.
 6. The rule of *stare decisis* will be observed where it is apparent that no substantial injury or injustice will result therefrom.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

ACTION by Patrick Deloughrey against Thomas R. Hinds, as county treasurer, and the county of Silver Bow. From a judgment overruling a demurrer to the complaint, defendants appealed. Reversed.

Mr. C. B. Nolan, Mr. C. P. Connolly, and Mr. R. L. Clinton, for Appellants.

Mr. C. D. Tillinghast, for Respondent.

Section 1696 of the General Laws of Montana for the year 1887, relating to Revenue, requires that each town or city lot be valued and assessed separately, except when one or more adjoining lots are returned by the same person. Separate and distinct parcels of real estate are to be considered as distinct subjects of taxation and must be separately valued and assessed. The rule applies to lots and blocks in cities and towns, and failure to observe this requirement will render an

assessment void. (*Powder River C. Co. v. Commissioners*, 45 Fed. 327; Am. and Eng. Enc. Law, Vol. 25, pp. 222 and 223 and Note 3, p. 223; *Calwallader v. Nash*, 73 Cal. 43.)

A radical defect in an assessment is such a nullity that it cannot be cured by prescription. (*People v. Holliday*, 25 Cal. 300.)

Lot 7, Block 18, the tax sale of which is sought to be restrained, is at least a full block distant from the other lots with which it was jointly assessed and taxed. It is claimed by the respondent that such assessment was not merely irregular but wholly void, being in palpable violation of the statute cited above, covering assessments at that time.

Where the law requires a separate assessment of lots, the requirement is held mandatory by the courts of nearly all the states under the general principle that whatever is required for the protection of the tax-payer is mandatory. (*Powder River C. Co. v. Com.*, 45 Fed. 327; Am. and Eng. Enc. Law, Vol. 25, pp. 76 and 77 and Note 1, p. 78; also p. 222, Note 4 and cases there cited; also pp. 299 and 300; Black on Tax Titles, Secs. 198 and 199 and cases there cited; *Life Association v. Assessors*, 49 Mo. 512; *Silsbee v. Stockle*, 44 Mich. 567; *Chicago Railway Co. v. Davenport*, 51 Iowa 454; *Marsh v. Clarke County*, 42 Wis. 502; *Hamilton v. Fon du Lac*, 25 Wis. 490; *Hewes v. Reis*, 40 Cal. 255; *People v. Hollister*, 47 Cal. 408; *Ruby v. Huntsman*, 32 Mo. 501.)

The distinction between void and irregular assessments was clearly made by this Court in *Casey v. Wright*, 14 Mont. 315. In that case the complaint did not set out the fact of the joint assessment of several distinct lots or parcels, and the opinion of the Court, so far as it discusses the complaint, takes for granted that the assessment was irregular and not void. But the answer in that case discloses the fact that the assessment of several lots or parcels was made as one assessment at a single valuation for all of the parcels so jointly assessed, which is the fact in this case, and the Court holds that a sale under such an assessment would be void and ought to be restrained, and that being a sale under circumstances iden-

tical with those set out in the complaint in this action, would be a void sale and hence restrained. In *Casey v. Wright*, the plaintiff owned lots 1, 2 and 3, block 81, and claimed the assessment invalid for the reason that the lots were assessed in gross and not separately. It also appears that said three lots and eight other lots in different blocks were sold in gross for the total tax on all of said lots. In this case we only have to do with the gross assessment. From the numbering of the lots (1, 2 and 3) it is presumed that the three lots adjoined each other and that they belonged to the same owner, and hence the assessment of those three lots was not in violation of the statute. It appears from the record in that case that the three lots were assessed separately from the other lots. Hence, it could be easily ascertained what proportion of the whole tax should be charged against the three lots of the plaintiff. This case is distinguished from *Casey v. Wright* in this:

1. In that case the lots assessed in gross were contiguous; in this case lots not contiguous were assessed in gross.

2. Plaintiff's lot in this case being assessed in gross with other lots not contiguous, was in direct violation of the statutes; whereas, in *Casey v. Wright* the assessment of the three lots was lawful.

3. The plaintiff in this case had no means of ascertaining what proportion of the whole tax should be charged against his lot, because there was one assessment in gross of all the lots. In *Casey v. Wright* the plaintiff's three lots were assessed separately from the other lots, and hence, the amount charged against those three lots could be easily ascertained.

The defendant's demurrer to the complaint in *Casey v. Wright* was sustained for the reason that, while the assessment was irregular, the amount of taxes chargeable to the plaintiff's three lots could be easily ascertained, and hence, should have been tendered. In *Casey v. Wright* the assessment was merely irregular; in this case the assessment was void, and there is no method by which the amount justly chargeable to plaintiff's lot could be ascertained, and for that

reason no tender was required. It is not contended by respondent that the rule in *Casey v. Wright* is erroneous, but the facts of this case radically differ from those of that case, so as to take this case out of the rule laid down in *Casey v. Wright*.

It will be observed that the case there cited (18 Cal. 149), being an assessment like the one in the case at bar, was held void, and this Court there held that the authorities are almost uniform that such a sale (and assessment) is void, and clearly holds that case identical with the case at bar in the latter part of the language above quoted. In *Silsbee v. Stockle*, 44 Mich. 561, it was held that the statutory provision that no sale for delinquent taxes shall be held invalid unless it be made to appear that all legal taxes were paid or tendered, is unconstitutional so far as it sustains sales for taxes which are in part illegal. Also, it is a presumption of law that the land demanded for a delinquent tax bears some proportion to the sum to be paid, and that if the tax is in part illegal, some portion of the land sold to pay it is taken to satisfy an illegal demand.

In *Raynor v. Lee*, 20 Mich. 384, it was held that a provision of law which requires that resident and non-resident real estate should be separately assessed, must be observed, or the assessment will be invalid, and a sale for such tax will convey no title.

In *Hewes v. Reis*, 40 Cal. 255, it was held that, where the statute requires a series of acts to be performed before the owners of the property are properly chargeable with the tax, such acts are conditions precedent to the exercise of the power to levy the tax, and all the requirements of the statute must be complied with or the tax cannot be collected.

In *People v. Hollister*, 47 Cal. 408, it was held that, when several parcels of land are assessed to the same person, they must be separately valued. In *Cadwallader v. Nash*, 73 Cal. 43, it was held that town lots must be separately listed and valued for assessment, and an assessment of several lots as one undivided parcel is void. This latter case is under a statute practically identical with the statute of this state.

The objection to the complaint in this case for the reason that no tender has been made, is not well taken, as fully appears by the foregoing.

Marsh et al. v. Supervisors of Clark County, 42 Wis. 502, was an action to restrain the county treasurer from issuing a tax deed where there was an illegal assessment. The statutes of Wisconsin require that lands shall be assessed from actual view. The assessors did not assess the land in question from actual view, the same consisting of a large tract of timber lands, some of which were broken and bluffy and of no value, except for timber, while other portions were level and fertile and valuable for agricultural purposes. The court held the assessment void.

If the tax is void, plaintiff is under no obligations to tender anything. (Cooley on Taxation, p. 764, note 1; *Powder River C. Co. v. Com.*, 45 Fed. 328, 329.)

Under the statute in force at the time the assessment complained of was made, the powers of the board of equalization were limited to the supplying of omissions, correcting clerical errors, and increasing or diminishing any assessment or valuation. The board of review only have power to increase or lower individual assessments and to correct clerical errors. (*S. V. W. Co. v. Schottler*, 62 Cal. 69; also *People v. Supervisors*, 40 Cal. 613.) Nor is there anything to the contrary in *First National Bank v. Bailey*, 15 Mont. p. 308, cited by appellants.

The assessment being void, and not merely irregular, could not be cured by the board of review, and hence no application to such board was necessary. (*Powder River C. Co. v. Com.*, 45 Fed. 327; Am. and Eng. Enc. Law, Vol. 25, p. 204, note 5, also pp. 222, 223, and note 5; also *Marsh v. Clarke County*, 42 Wis. 402; also *San Luis Obispo v. Pettit*, 87 Cal. 499.)

The case at bar is distinguished from *N. P. Ry. Co. v. Patterson*, 10 Mont. p. 106, cited by appellants, in which relief was sought from a tax claimed to be excessive, and which was clearly within the powers of the board of review, and hence the complaint in that action, which failed to allege any appli-

cation to the board of review, or of a tender of the correct or proper portion of the tax, was clearly defective. In this case, one wishing to relieve the lot in suit from the lien of the tax could not by any possible means estimate the amount properly chargeable to that lot. It follows, that the board of equalization having no jurisdiction in such case, it was unnecessary to go before such board, because they would have no power to give life to a void assessment.

In *N. P. Ry. Co. v. Patterson*, the assessment was irregular, not void, and the question to be determined was, whether the court would interfere to diminish the assessment when the plaintiff had not applied to the board of review to obtain such relief. In that case it was conceded that part of the assessment was valid; in this case, it was wholly void.

Section 3915 of the Political Code of Montana provided that if the treasurer discovers before sale that on account of irregular assessment the land ought not to be sold, he must not offer it for sale, and herein lies the secret of the failure of the defendant county to offer this property for sale during all of the years intervening between the assessment and the present year. If the section last cited debars the treasurer from selling when an irregularity is discovered, how much more when the assessment is void.

We think it follows, the statute being mandatory, that the sale must be restrained. The remedy by injunction against an illegal and void tax is the proper one. (38 N. E. 600; *Reilly v. Telegraph Co.*, 47 Ind. 511; *Shoemaker v. Board*, 36 Ind. 175; *Williamsport v. Kent*, 14 Ind. 306; *Miles v. Ray*, 100 Ind. 166; *Knight v. Turnpike Co.*, 45 Ind. 134; *Cooley on Taxation*, pp. 746, 747, 773; *Hobbs v. Tipton Co.*, 103 Ind. 575.) The owner of real estate may by injunction prevent a cloud being cast on his title. (*Thomas v. Simmons*, 103 Ind. 538; *Bishop v. Morronan*, 98 Ind. 1; *Petry v. Ambroscher*, 100 Ind. 510.) Where a tax is a lien, equity will interfere and remove the cloud upon the title. (*Cooley on Taxation*, pp. 746, 747, 761; *Schulenberg-Boecker Lbr. Co. v. Town of Hayward*, 20 Fed. 422; *Albany City Bank v. Maher*, 9 Fed. 884; *N. P. Ry. Co. v. Galvin*, 85 Fed. 811.)

PER CURIAM.—This is an action by the plaintiff, Patrick Deloughrey, for an injunction to restrain the defendant, Thomas R. Hinds, as treasurer of Silver Bow county, and his successors, from selling certain property situated in the city of Butte, in said county, for city and county taxes assessed and levied for the year 1890. After alleging the official character of the defendant, the plaintiff avers substantially that he is the owner of lot No. 7 of block No. 18 of the original townsite of Butte, as it appears on the official plat of the city on file with the recorder of Silver Bow county; that in the year 1890 the duly elected, qualified, and acting assessor of the county of Silver Bow made an assessment upon the property above described, together with the south half of lots 6, 7, and 8 of block No. 8 of the original townsite of Butte, including all as one parcel, and putting a gross valuation upon the whole of \$3,550; that the total county tax charged against all of said lots under said assessment was the sum of \$49.70; that the city tax for that year levied and assessed upon the said lots, in the same manner, was the sum of \$180.18; that the said assessment was and is fraudulent, illegal, and void, for the reason that the said property of this plaintiff above described then consisted of a town or city lot which did not and does not adjoin the other lots above described, but was and is separate, distinct, and apart from the other said lots; that for this reason it was impossible for the plaintiff, who is now the owner of the said lot No. 7 aforesaid, to “remove the said taxes from being a cloud to his said property by payment of the said taxes thereon”; that, pursuant to such illegal, fraudulent, and wrongful assessment, the sum of \$229.88, alleged taxes, is illegally, fraudulently, and wrongfully charged against this plaintiff and his “said premises” for the said year 1890; that this plaintiff has no adequate remedy at law “for the purpose of removing the cloud upon the title to his said premises”; that the alleged taxes now appear spread upon the tax roll of the county of Silver Bow for the year 1890, and are apparently legal and valid, and are upon the face thereof a lien upon the said property of this plaintiff

and a cloud upon his title thereto; and that the said Thomas R. Hinds, as treasurer aforesaid, threatening to take proceedings to enforce the collection of said taxes so illegally, fraudulently, and wrongfully assessed and levied, has advertised the same for sale, and intends to expose said property of the plaintiff for sale, at public tax sale, and to sell the same, for the purpose of collecting the whole sum of said taxes, thereby casting a further cloud upon the plaintiff's title to his said property, to his (the plaintiff's) great and irreparable injury and damage. From a plat attached to the complaint, it appears that lot 7 is about one block distant from the other lots mentioned.

To this complaint the defendants interposed a general demurrer. After a hearing upon the demurrer, the district court overruled it, and, counsel for defendants electing to stand on the demurrer, the court ordered judgment in favor of the plaintiff that a perpetual injunction issue restraining defendant Hinds and his successors from proceeding with the sale. From this judgment defendants have appealed.

The defendants insist that the complaint is not sufficient to sustain the judgment of the district court, because its allegations are defective in two particulars, to wit:

1. That it fails to allege a tender of any part of the taxes due for the year 1890; and,
2. That no relief was seasonably sought from the board of county commissioners of Silver Bow county, sitting as a board of equalization, for the purpose of correcting the assessment.

The assessment was made under the provisions of the Laws of the 15th Extra Session of 1887 (page 82), as amended by the Laws of 1889, 16th Session (page 219). Under amended section 14 of this act (section 4, Act of 1889), it was the duty of the taxpayer, upon demand by the assessor, to make out a statement under oath containing a list of all his property, for the purpose of taxation. Under amended section 15 (section 5, Act of 1889), it was the duty of the assessor thereupon to determine and fix the true value of all items of property in-

cluded in such statement, and to enter the same opposite each item, so that, when completed, such statement should truly and distinctly show "the number of town or city lots, giving the description and the value thereof." Section 22 provided that upon the completion of the roll by the assessor, and on the third Monday of September, and from day to day thereafter, the board of commissioners of the county should sit as a board of equalization, "and any person feeling aggrieved by any valuation or amount of property listed, or by any other fact appearing on such assessment, may apply to such board for the correction thereof." The board was authorized thereupon to make such correction.

Questions arising out of assessments made under the provisions of this statute have been before this court in several cases, and we are of the opinion that the precise one involved in this case has been settled adversely to the plaintiff. In *Northern Pac. Railroad Co. v. Patterson*, 10 Mont. 93, 24 Pac. 704, an injunction was sought to restrain a sale of lands for taxes delinquent for the year of 1889. A part of the lands was alleged to be exempt from taxation under the laws of the territory of Montana, and as to the other lands—which were town lots—the allegation was that the assessment was void, because the valuation made thereon was in gross, and not in conformity with the provisions of the statute. This court held, after an examination of the adjudicated cases, that the complaint was bad, in that it failed to allege a tender of the taxes delinquent upon that part of the lands not exempt, this amount being apparent from the assessment, and also in that it failed to show that the plaintiff had applied to the board of equalization to correct the errors complained of. The question arose in that case on demurrer. The same question was again presented, with others, in *Ward et al. v. Board of Commissioners of Gallatin County*, 12 Mont. 23, 29 Pac. 658. The treasurer of Gallatin county had sold the lands of the plaintiff for taxes delinquent for the year 1889. These lands, owned in separate parcels, not adjoining, had been assessed and valued in a lump sum, together with certain personal

property. The whole amount of the lands had been sold for the taxes due upon them, and also upon the personal property. The time for redemption having expired, the treasurer was about to issue his deed to the purchaser. Suit was brought to set aside the sale and to enjoin the issuance of the deed. The complaint was by the lower court held bad on demurrer, and upon appeal to this court the judgment was affirmed. Chief Justice Blake, approving *Northern Pac. Railroad Co. v. Patterson*, *supra*, uses the following language: "The principles which were laid down in *Northern Pac. Railroad Co. v. Patterson* are applicable, and the appellants could have obtained an adequate remedy on account of these irregularities by appearing before the board for the correction of the assessment roll." And again, in another part of the opinion: "We cite again the case of *Railroad Co. v. Patterson*, *supra*, and hold that the appellants cannot invoke the aid of an injunction, when they do not offer to do equity by tendering any part of the taxes which they owe to the county of Gallatin and the state." We agree with the conclusion reached that a court of equity will not grant relief to a taxpayer when the only ground alleged to invoke its aid is an irregularity in the assessment. In *Casey v. Wright*, 14 Mont. 315, 36 Pac. 191, the plaintiff sought to set aside a tax deed issued to the defendant by the treasurer of Custer County to lots 1, 2 and 3, block 81, of Miles City, and to have it removed as a cloud from his title. The ground of complaint was that these lots had been assessed in gross, and that in making the sale the treasurer had sold them in gross with other lots. This assessment had been made for the year 1888 under the act of 1887, *supra*, the provisions of which were substantially the same as those of the amended act. The district court sustained a general demurrer to the complaint, and this court affirmed the judgment, citing, with approval, *Railroad Co. v. Patterson* and *Ward v. Commissioners*, *supra*, upon the ground that the plaintiff could not be heard to complain of an irregularity in the assessment so long as no tender of the taxes justly due had been made, and no showing was made of injustice or

injury to the plaintiff resulting from the assessment. In the subsequent case of *First National Bank v. Bailey*, 15 Mont. 301, 39 Pac. 83, the case of *Railroad Co. v Patterson*, *supra*, was again cited with approval upon the point that, where the plaintiff had failed to apply seasonably to the board of county commissioners for the correction of an irregularity in the assessment, he was not entitled to any relief from a court of equity. This case arose upon an assessment made under the provisions of section 6 of the act of 1891, substantially the same as the provisions of the act of 1887, cited *supra*. In the case under consideration the plaintiff does not avoid the consequences of the rule laid down in the cases cited. He fails to show that he attempted to have the irregularity complained of corrected by application to the tribunal provided by law for that purpose; nor does he allege any excuse for not doing so. This failure on his part is, in itself, sufficient ground for denying him the relief sought herein.

We think the complaint bad, also, on the ground that the plaintiff does not offer to pay taxes admittedly just and due to the county and state. He is adroit in attempting to evade the rule of the cases just cited by claiming that he has no way of determining the amount due upon lot 7 of block 18, because he cannot fix from the gross valuation of the lots the amount due thereon. It will be noted, however, that he alleges that he *is* the owner of this lot. He does not say whether he was also the owner at the time the assessment was made. Again, in another part of the complaint, he alleges "that it is impossible for this plaintiff, who is *now* the owner of said lot, * * to remove said taxes," etc. From this condition of the pleading we are left to make the inference (and we think it a fair one) either that he was the owner of all the lots assessed in gross in 1890, or that he has purchased the one in controversy since that time. Inasmuch as no complaint is made of the assessment other than that the valuation was made in gross, we presume that the return was properly made to the assessor by the owner under the provisions of section 14, *supra*, and that it was the assessor's fault that the valuation

was made as it was. If the plaintiff was the owner of all the lots, and still is, he can easily know what it is incumbent upon him to pay, no matter what the irregularity of the assessment was. As no complaint is made that the tax imposed is unlawful or unjust, except upon the ground that the assessment is irregular, it is clear that he should pay the whole amount of taxes assessed. If he purchased from the owner after the assessment was made, and the burden was then upon the property, he cannot complain to this court that he has been wronged in any respect,—his remedy is against his grantor. To hold otherwise would be to say that the owner of the property could be excused from the performance of his duty by selling out his property to different purchasers, thus escaping liability himself, and clothing the purchasers with such equities that they can escape also. Again, if we are to infer that the plaintiff owned the lots at the time of the levy, but has since sold all but the one in controversy, he is still at fault, because he should pay the full amount of taxes due upon all. In any event, he is not in position to claim, as he does, that he should be excused from tendering the amount of taxes due.

It is further urged by the defendants that the demurrer should have been sustained under the provisions of sections 4023–4026 of the Political Code, prohibiting the issuance of an injunction to restrain the collection of taxes except in unusual cases, and providing a remedy for cases where the tax is deemed to be unlawful. As we have already concluded upon other grounds that the judgment cannot be sustained, we do not deem it necessary to enter into a discussion of these provisions.

Plaintiff insists that the conclusion reached by this court in the cases cited, that an assessment in gross is a mere irregularity, is not supported by the weight of authority. We do not feel inclined to examine the authorities to determine the correctness of this claim. These cases were decided after such examination, and the rule laid down by them has become so well established in this jurisdiction that we do not feel disposed to disturb it, it being apparent that no substantial in-

jury or injustice will result from observing the rule of *stare decisis*.

The judgment is reversed, and the cause is remanded to the district court, with directions to sustain the demurrer.

Reversed and remanded.

MANHATTAN TRUST CO., TRUSTEE, RESPONDENT, v.
DAVIS, ET AL., APPELLANTS.

[No. 1,133.]

[Submitted July 10, 1899. Decided October 24, 1899.]

*Foreign Corporations—Conditions Precedent to Transaction of
Business—Papers Required to be Filed—In What Counties
Necessary—Contracts—Penal Statutes—Construction.*

1. The requirements of Compiled Statutes 1887, Sections 442-444, that a foreign corporation shall, before doing any business of any kind within the territory, file certain papers with the recorder of the county where it intends to do, or is doing, business, and invalidating its contracts and imposing on it a forfeiture of a certain sum per day during the period of its neglect, and Section 445, requiring it to file an annual report in the county where its business is carried on, are complied with by filing the same with the recorder of the county where its principal office for doing business within the state is located, and filings need not be made in every county where it may transact any item of business.
2. Forfeitures of contracts not immoral or against public policy are not to be declared unless the law under which the forfeitures are claimed is so clear and direct in language that it admits of but one construction by which the contract sued upon must be adjudged void and unenforceable.
3. A statute requiring foreign corporations, before doing any business of any kind within the state, to file certain papers in certain public offices, and prescribing penalties against the corporation which attempts, or commences, to do business in the state without first having filed the necessary papers, is, in a sense appertaining to construction, a "penal" statute, and is to be construed strictly—not liberally.
4. Under the rules of construction laid down in Section 539, Division I, and Sections 207, 208, Division V, Compiled Statutes 1887, words, which are repugnant to the context, and to the real object of a statute, will not be interpolated.

Appeal from District Court, Missoula County; F. H. Woody, Judge.

ACTION by the Manhattan Trust Company, trustee, against Mary M. and Smith Davis. Judgment for plaintiff, and defendants appeal. Affirmed.

STATEMENT OF THE CASE.

Action to foreclose a certain mortgage. On November 10, 1892, the Northwestern Guaranty Loan Company, a Minnesota corporation, loaned to Mary M. Davis and her husband, appellants herein, \$2,350, for which loan the corporation accepted the joint promissory note of appellants for \$2,350, dated at Minneapolis, Minn., November 7, 1892, and due three years after date, with interest at 6 per cent. per annum. To secure the payment of this loan the Davises executed and delivered to the Northwestern Guaranty Loan Company a mortgage upon certain lots in the city of Missoula, which mortgage was recorded with the county recorder of Missoula county. Thereafter, on November 27, 1892, the Northwestern Guaranty Loan Company, for value, and in the regular course of business, transferred said note to the respondent herein, the Manhattan Trust Company of New York, as trustee, by indorsement before maturity, and by a written instrument on the same day duly assigned the said mortgage to the trust company, as trustee. Thereafter, in June, 1896, the said Manhattan Trust Company, as the indorsee of the note of the Davises and as the assignee of the mortgage, brought this action to enforce its claim by foreclosure of the mortgage above described. The plaintiff, by an amended complaint, averred in detail that the Northwestern Guaranty Loan Company, its predecessor in title, had strictly complied with all of the provisions of the constitution and laws of the state of Montana in relation to the terms and conditions upon which foreign corporations might transact and carry on business within the state of Montana, and that such compliance had been had prior to the mortgage loan involved herein. The allegation in respect to a compliance with the laws pertaining to foreign corporations was, in effect, that the Northwestern Guaranty Loan Company had filed in the office of the secretary of the state of Montana, and in the office of the county recorder of the county of Lewis and Clarke, in which county said corporation intended to carry on and transact business, a

duly authenticated copy of its certificate of incorporation, and also a statement showing the name of the corporation, and the location of its principal office or place of business within the state of Montana, at the city of Helena, county of Lewis and Clarke. The allegation is also specific in relation to other matters embraced in the provisions of sections 442 and 443 of Chapter XXIV., Fifth Division, Compiled Statutes of Montana, (1887.) The amended complaint did not state, however, that any certificates, papers, or statements had been filed by the corporation in the office of the clerk and recorder of Missoula county, wherein the loan was made and the note and mortgage were executed.

The defendants demurred generally and specially to the amended complaint. The demurrer was overruled, whereupon they filed an answer, the substance of which is stated as follows by defendants' counsel in their brief: "Denying that the Northwestern Guaranty Loan Company had complied with the laws of Montana respecting foreign corporations, requiring them, before doing business within the state, to file certain papers, certificates and statements in the office of secretary of state, and of the clerk and recorder of the county wherein they intended to carry on business, and alleging that the Northwestern Guaranty Loan Company established an office in the city and county of Missoula, state of Montana, under the management of one Francis L. Ide, its agent and manager, and, in addition to the business done with these defendants, said Northwestern Guaranty Loan Company negotiated for loans with numerous persons in Missoula county, and maintained and conducted said place of business in Missoula county, and had numerous transactions with the citizens of Missoula county, but never, either before or since transacting said business, filed any certificates, or papers in the office of the clerk and recorder of Missoula county, such as were required by sections 442 and 443 of the General Laws of Montana (Compiled Statutes of 1887) with respect to foreign corporations doing business in the state, and because of such failure to file the said certificate the Northwestern Guar-

anty Loan Company was not authorized to do and transact business in Missoula county, and that therefore the notes and mortgage described in the complaint are and were void, and that the plaintiff is not entitled to recover therein; that the Northwestern Guaranty Loan Company was insolvent during the time it transacted business in Missoula county, and the people with whom it did business had no opportunity of knowing its financial condition, because of its failure to file the certificates required by law in the office of the clerk and recorder of Missoula county; and that the transfer of the mortgages, notes, etc., negotiated for by the Northwestern Guaranty Loan Company with the people of Missoula county, to the plaintiff, was made in fraud of the rights of the people with whom said transactions were had, and for the purpose of depriving them of the opportunity of making their just and valid defense thereto." On motion of plaintiff the court struck out the foregoing quoted substance of defendant's answer. Judgment was thereafter entered against the defendants, after the court had heard plaintiff's proofs and considered defendants' admissions.

It was admitted in the district court by the appellants (defendants) that prior to the making of the loan, and prior to the acceptance of the note or mortgage, the Northwestern Guaranty Loan Company had filed in the office of the secretary of state, and in the office of the county clerk and recorder of the county of Lewis and Clarke, Mont., all of the papers required by the constitution and laws of the state to be filed by foreign corporations before doing business in the state, while the plaintiff (respondent) admitted that the Northwestern Guaranty Loan Company had not at any time filed any of said papers, or copies thereof, in the office of the county clerk and recorder of Missoula county, which was the county in which the Northwestern Guaranty Loan Company negotiated and contracted the loan. The defendants appeal.

Messrs. Marshall, Ogden & Ranft, for Appellants.

Messrs. Toole, Bach & Toole, and *Mr. I. Parker Veazey*, for Respondent.

MR. JUSTICE HUNT, after stating the case, delivered the opinion of the Court.

When the mortgage herein involved was made, and when the note described therein was assigned, the statutory provisions prescribing what formalities should be complied with by foreign corporations before doing business within Montana were included in Chapter XXIV, Fifth Division, Compiled Statutes of 1887; so we have assumed that defendants are correct in their argument that the question for decision involves an interpretation of the statutes just referred to, and that Section 4 of an act to provide the conditions upon which foreign corporations may do business in Montana, approved March 8, 1893, repealing Chapter XXIV of the Compiled Statutes, is immaterial to the controversy. Accordingly, we must ascertain whether the mortgage sought to be foreclosed is void for the reason that the Northwestern Guaranty Loan Company, the original mortgagee, failed to file any of the papers specified in the foreign corporation statutes referred to, in the county of Missoula, where the loan was made, the corporation having theretofore filed the papers required to be filed in the office of the secretary of state, and having also filed the papers, specified in Sections 442 and 443 of the statutes, in the office of the county recorder of Lewis and Clarke county, in which said county the corporation avers it intended to carry on and transact its business. The material parts of Section 442 are as follows:

“All foreign incorporations or joint stock companies, organized under the laws of any state or territory of the United States, or by virtue of any special act or acts of the legislative assembly of any such state or territory, or of any foreign government, shall, before doing any business of any kind, nature, or description whatever, within this territory, file in the office of the secretary of the territory, and in the office of the county recorder of the county wherein they intend to carry on or transact business, a duly authenticated copy of their charter, or certificate of incorporation, and also

a statement, to be verified by the oath of the president and secretary of such incorporation, and attested by a majority of its board of directors, showing:

“First. The name of such incorporation and the location of its principal office or place of business without this territory; and if it is to have any place of business or principal office within this territory, the location thereof. * * * ”

The particular clause by which the appellants contend the mortgage is invalidated is as follows:

“Sec. 444. * * * Or if any foreign incorporation shall hereafter attempt or commence to do business in this territory without having first filed said statements and certificates required by this chapter, it shall forfeit to the people of Montana the sum of ten dollars for every day it shall so neglect to file the same, and all acts and contracts made by such incorporation, or any agent or agents thereof, during the time it shall so fail and neglect to file said statements and certificates, shall be void and invalid as to such incorporation. It shall be the duty of the district attorney of the county in which the business of such corporation shall be located to sue for and recover in the name of the people of the territory the penalty above provided, and the same, when so recovered, shall be paid into the treasury of such county for the use of the common schools therein.”

The consequences of attempting or commencing to do business without first having filed the statements and certificates are very severe, involving, as they may, a fine of \$10 for every day's neglect to file the papers, and the invalidity of the contracts as to the corporation. This may mean a very heavy fine, and the loss of rights to enforce contracts to recover immense sums of money loaned by a foreign corporation in the best of faith, and borrowed by citizens of the state who confess the justice of the corporation's claims, but who refuse to pay the money borrowed for the reason that when the creditor corporation loaned the sum it had not complied with certain statutory regulations affecting foreign corporations. We do not mean to intimate a doubt of power on the

part of the legislature of the state to prescribe regulations under which a foreign corporation can do business in the state, or to fix penalties for violations of such regulations—it is too well settled that a state has such a power—but we do say that, on principle, forfeitures of contracts not immoral or against public policy are not to be declared unless the law under which the forfeitures are claimed is so clear and direct in its language that it admits of but the one construction, by which the contract sued upon must be adjudged void and unenforceable. (Bishop on Contracts, Sec. 417.) The statute here relied upon by the defendants prescribes penalties against the corporation which omits to file the necessary papers. It is a penal law,—not penal in the strict sense of being a criminal law, yet penal in the sense that a duty is imposed upon a foreign corporation before it can do business in the state, and a right conferred upon the citizens to claim a contract made to be invalid for the omission to perform that duty.

In *Huntington v. Attrill*, 146 U. S. 657, 13 Supreme Court 224, Justice Gray, for the court, said: “In the municipal law of England and America, the words ‘penal’ and ‘penalty’ have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the state, for a crime or offense against its laws. (*United States v. Reisinger*, 128 U. S. 398, 402; 9 Supreme Court 99; *United States v. Chouteau*, 102 U. S. 603, 611.) But they are also commonly used as including any extraordinary liability to which the law subjects a wrongdoer, in favor of the person wronged, not limited to the damages suffered. They are so elastic in meaning as even to be familiarly applied to cases of private contracts, wholly independent of statutes, as when we speak of the ‘penal sum,’ or ‘penalty’ of a bond. In the words of Chief Justice Marshall: ‘In general, a sum of money in gross, to be paid for the nonperformance of an agreement, is considered as a penalty, the legal operation of which is to cover the damages which the party in whose favor the stipulation is made may have sustained from the breach of contract by the opposite

party.' (*Taylor v. Sandiford*, 7 Wheat. 13, 17.) Penal laws, strictly and properly, are those imposing punishment for an offense committed against the state, and which, by the English and American constitutions, the executive of the state has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal." And later on in the same opinion he wrote that a statute which imposed a "burdensome liability" on the officers of a corporation for their wrongful act might well be considered penal, "in the sense that it should be strictly construed;" yet that it was not penal in a sense that it could be enforced in a foreign state or country.

So, in a sense appertaining to construction, the statute is penal, and is to be so regarded. In *Chase v. Curtis*, 113 U. S. 452, 5 Sup. Ct. 554, the supreme court, in discussing the alleged liability of trustees of a corporation, formed for certain purposes under the laws of New York, for debts of the corporation, on failure to file the reports of capital and of debts required by a section of the statute of New York, said: "But, as we have already seen, the statute involved in this discussion is not a remedial statute, to be broadly and liberally construed; but is a penal statute, with provisions of a highly rigorous nature, to be construed most favorably for those sought to be charged under it, and with strictness against their alleged liability."

The decisions of this court have likewise characterized analogous statutes as penal. (*Gans v. Switzer*, 9 Mont. 408, 24 Pac. 18; *Wethey v. Kemper*, 17 Mont. 491, 43 Pac. 716; *State Savings Bank v. Johnson*, 18 Mont. 440, 45 Pac. 662; *Giddings v. Holter*, 19 Mont. 263, 48 Pac. 8.) Using the word, therefore, in its judicial sense, we affirm the doctrine that it is a penal statute, and is to be construed strictly, and not liberally—wherefore no construction should be adopted which prevents the collection of a debt confessedly justly owing to a foreign corporation, unless the court is constrained

to pronounce its judgment in aid of a refusal to pay. (*Eastern B. & L. Association v. Bedford*, 88 Fed. 7.)

Section 442 requires a foreign corporation, *before doing business of any kind, nature, or description whatever* within Montana, to file in the office of the secretary of state, and *in the office* of the county recorder of the county wherein it *intends* to carry on business, a duly authenticated copy of its charter, etc., and a verified statement showing, among other things, the location of its principal office or place of business, and, if it is to have a place of business or principal office within this state, the location thereof. It is also provided by subsection 6 that the corporation shall file *at the same time*, and *in the same offices*, a certificate consenting to be sued in the courts of this state, and that process may be served upon some designated person.

Section 444 relates to foreign corporations doing business in the state when the law was enacted, and requires that within four months after the publication of the act they should file in the office of the secretary of state, and *in the office* of the county recorder of the county wherein they are respectively doing business, the statement and certificate required to be filed by section 442, *supra*. Further on it is provided that, if any foreign corporation shall hereafter *attempt or commence to do business* in the state without *having first* filed said statements and certificates, all acts and contracts made by such incorporation during the time it so failed to file said papers shall be void and invalid as to such corporation, and the corporation shall forfeit to the people of the state \$10 for every day that it has neglected to file such statements, and it is made the duty of the district attorney of the county in which the business of such corporation shall be located to sue for the penalty provided for.

Section 445 covers the filing of an annual report by foreign corporations, "which report shall be filed in the office of the county recorder of the county wherein the business of said corporation is carried on, and a duplicate thereof in the office of the secretary of state."

In our judgment, the several foregoing provisions of the statute relating to the place wherein the corporation intends to carry on its business have reference to the location or place of doing business or principal office within the state, and not to every place where the corporation may transact any item of business therein, or in which it may do business subsequent to the first filings. Words concerning domestic corporations found in section 446 *et seq.*, requiring a certificate to be filed in the office of the clerk of the county in which the business of the company shall be carried on, have been held to refer to the legal home of the corporation; and the reasoning which led the court in *Gans v. Switzer, supra*, to so hold, applies to similar expressions used throughout Chapter XXIV, pertaining to foreign corporations. The purpose of the legislation is to compel a foreign corporation desiring to avail itself of the privilege of doing business within the state to submit itself to the jurisdiction of the courts of the state, and to advise the public of its condition, so that those willing to deal with it may be informed of its affairs, by inquiring at the recorder's office where its location has been taken up, and to punish those corporations which fail to comply with the law. Regulation is the primary policy of the legislation—and to make such regulations effective the penalties are imposed. But it never was intended that the statute could be easily invoked to prevent the enforcement of a contract which every principle of justice demands shall be upheld, if the law has been substantially complied with by the foreign corporation.

The law contemplates one filing with the secretary of state, and one filing with the county recorder of *the county* wherein the foreign corporation intends to carry on or transact business. If, for example, a foreign corporation expects to do its business in Dawson county, and its principal office is to be there, the requisite papers must be filed with the secretary of state, and with the county recorder of Dawson county. The statute requires these filings *before* doing *any* business of *any* kind, nature, or description whatever, and imposes a penalty for *any* attempt, even, or commencement, to do business in

the state *without having first* filed the statements and certificates required. Clearly, therefore, the statute contemplates and demands a full compliance with the law before even an attempt at business can be made. No subsequent filings are provided for; nor are subsequent acts to be done, as a condition precedent to the right to do an extended business. This being true, the law has made no provision at all for the extension of a corporation's business; but, if appellants' argument is sound, a corporation could never extend its business beyond a single county it contemplated doing business in when it came into the state, unless at the time it filed its papers with the secretary of state it also filed like papers with every county recorder in the several counties of the state where its business might extend to. We do not believe the legislature contemplated any such policy, for, had they done so, they could easily have said that the papers provided for should be filed in each and every county in which the corporation intended to do business, or into which it might possibly thereafter extend its business. The words "the county" particularize that county where the corporation intends to carry on its business, while the words "each county" would mean *every* county in which they intended to do business, and, if extension was contemplated, a filing in every county into which extension might go would be essential, and all filings would have to be made before attempting to do business, or there could be no extension without violating the statute. It may be that the legislature assumed that a foreign corporation would do business in but the one county wherein it filed its statement and certificates. That is conjectural, however, and we shall not pursue the probability involved, but are thoroughly satisfied to hold to those rules of strict scrutiny which justify the reasonable and just construction by which the foreign and domestic corporations are put as near the same level as possible, where the purposes of the laws requiring the certificates and statements are substantially the same. (See Chapter XXV., Compiled Statutes of 1887.)

It is said that the word "county" should be read "county

or counties," in Section 442, under the rules of construction laid down in Section 539, page 201, First Division, and Sections 207, 208, page 649, Fifth Division, of the Compiled Statutes of Montana, and that when so read the legislative intent is made clear and may be effectuated. The sections cited require that when any subject, matter, party, or person is described or referred to by words imparting the singular number, several matters and persons shall be deemed to be included, unless it be otherwise especially provided, or unless there be something in the subject or context repugnant to such construction. The difficulty with this argument is that it requires the interpolation of words which, in our view, make the proposed amendment repugnant to the context, and to the real object of the statute as indicated above. For this reason we are unable to construe the statute as suggested.

The question before us has been decided by Judge Knowles, of the United States court, who reached the same conclusion we do, saying: "In looking at the 442d section of Chapter XXIV, Compiled Laws of Montana, it will be observed that foreign corporations are to make the statement and record required thereby 'in the office of the secretary of the territory, and in the office of the county recorder of the county wherein they intend to carry on or transact business,' and the statement shall state the 'principal office or place of business.' There is no requirement that the record shall be made in every county wherein the said corporation may transact any business. * * * As it does not clearly state or imply that a foreign corporation should make the statement specified in said Chapter XXIV in each county of the state before doing business therein, it should not be so construed. If the statute is complied with in filing the necessary statement in the office of the secretary of state, and in the county wherein the corporation has its principal office or place of business, it will be sufficient." (See *Black v. Caldwell*, 83 Fed. 863.)

The judgment is affirmed.

Affirmed.

O'ROURKE, RESPONDENT, v. SCHULTZ, APPELLANT.

[No. 1,188.]

[Submitted July 12, 1899. Decided October 25, 1899.]

23	285
24	108
23	285
25	110

*Sale—Rescission—Assignment Pendente Lite—Objections—
Waiver—Conditional Judgment—Injunction—Corporations
—Transfer of Stock—Rights of Transferee—Tender of
Shares—Appeal and Error—Law of the Case.*

1. The only exceptions which may be considered on appeal are those taken, or preserved to, the appellant.
2. Where a contract provided that, if the purchaser of property should become dissatisfied, she should be entitled to a return of the purchase price on surrender of the property sold, the fact that pending the suit to enforce such agreement she assigned the contract is immaterial, since Code of Civil Procedure, Section 22, authorizes the continuance of a suit in the name of the original party, or substitution of the transferee, where plaintiff's claim is transferred *pendente lite*.
3. Where, in an action on a contract, it appeared that plaintiff's interest had been assigned to another *pendente lite*, and defendant made no objection to such assignment in that action, he cannot subsequently object thereto in a proceeding to restrain the enforcement of the judgment recovered.
4. Where, after a judgment for the rescission of a contract on plaintiff's surrender of property received thereunder, it appears that she was unable to make such surrender, defendant is entitled to restrain the enforcement of the judgment.
5. Where a transfer of corporate shares is valid, no irregularity in the issuance of the stock certificate to the transferee can affect her interest or lessen her rights to the stock transferred.
6. A contract provided that, if the purchaser of a one-fourth interest in brick works should become dissatisfied with the purchase, she should be entitled to a return of the purchase price on surrender of the property sold. Subsequently, by agreement of both parties, her interest was transferred to a corporation, and 2,500 shares of its stock received, as representing the property. After the purchaser had sued to rescind the contract, she assigned it, and her assignee tendered the vendor 2,500 shares, to which she was legally entitled as against the corporation. *Held*, that such tender was valid, notwithstanding alleged irregularities in the issuance of the certificate representing the stock.
7. Where defendant objected to a tender of corporate shares on the ground that they had been attached in the hands of a former owner only, he cannot subsequently object to such tender on the ground of irregularities in the issuance of the certificates.
8. Where, on appeal from an action to enforce a rescission of a contract for the sale of property represented by corporate shares, it was determined that the identical shares originally owned by plaintiff need not be returned, but any shares representing the value of the property might be tendered, such determination is the law of the case on a subsequent appeal of a proceeding to restrain the enforcement of the judgment.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

INJUNCTION by John O'Rourke against Mary Schultz to restrain the enforcement of a judgment. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Mr. F. T. McBride, Mr. John W. Cotter and Messrs. Toole, Bach & Toole, for Appellant.

In the opening portion of this argument we will assume that it was necessary for Mrs. Schultz, before or at the trial, to tender the 2,500 shares of stock; and will attempt to show that, even under this view of the case, neither the complaint nor the testimony shows facts sufficient to sustain the preliminary injunction, or the awarding of a new trial of the original cause of action. There are two propositions of law which, when applied to the facts in this case, should, in our opinion, result in a reversal of the judgment of the order appealed from. (1st) Equity will not interfere to set aside a judgment except where the plaintiff (defendant in the judgment) was prevented by fraud, unavoidable accident, mistake or surprise—from availing himself of a defense to the original action. (2nd) Where he also shows that he was free from neglect. These are elementary propositions and are supported by the following authorities: *Mayor of New York v. Brady*, 115 N. Y. 599; *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970, affirmed on rehearing 27 Pac. 537; *Brick v. Barr*, 47 N. J. Eq. 189; *Brown v. County of Buena Vista*, 95 U. S. 157; *Crim v. Handley*, 94 U. S. 652; *Hendrickson v. Hinckley*, 17 How. (U. S.) 443; *U. S. v. Throckmorton*, 98 U. S. 61; *Vance v. Burbank*, 101 U. S. 514; *Steel v. Smelting Co.*, 106 U. S. 447-453; *Greene v. Greene*, 2 Gray 363; *Zellerbach v. Allenberg*, 67 Cal. 296; *U. S. v. White*, 14 Fed. 561; *Dringer v. Receiver*, 42 N. J. Eq. 573 and cases cited; *U. S. v. Hancock*, 40 Fed. 851-854; *Amador C. & M. Co. v. Mitchell*, 59 Cal. 168; *Field v. Flanders*, 40 Ill. 470; *Hanley v. Hanley*, 114 Cal. 690 and cases cited; *Stein v. Benedict*, 83 Wis. 603, 614; *Town of Andes v. Millard*, 70 Fed. 515-517; *Barnet v. Kilbourne*, 3 Cal. 327; *Freeman on Judgments*, Vol. 2, Sec. 503; *Allen v. Currey*, 41 Cal. 318; *Know*

County v. Harshman, 133 U. S. 152; *Gray v. Barton*, 62 Mich. 186—196—7; *Codde v. Mahiat*, 66 N. W. 1093 (Mich.); *Lieby v. Parks*, 4 Hammond (Oh.) 469; *Green v. Dodge*, 6 Hammond (Oh.) 80; *Conway v. Ellison*, 14 Ark. 360; *Wingate v. Haywood*, 40 N. H. 437; *Weir v. Vail*, 65 Cal. 468; *Hamilton v. McLean*, 139 Mo. 675, 687; *Ratliff v. Stretch*, 130 Ind. 285; *Hollinger v. Reeme*, 138 Ind. 363; *Woodward v. Pike*, 43 Neb. 777, 62 N. E. 230; *Cotzhausen v. Kerting*, 29 Fed. 821; *Edmanson v. Best*, 57 Fed. 531.

We believe the following propositions or rules of law are well established by the foregoing cases:

1st. That in order to set aside a judgement or restrain the execution thereof on the ground of fraud,—the fraud must be a fraud which is collateral to the issue, and not a fraud (or even a perjury) in the presentation of evidence, or the suppression of evidence.

2nd. That the plaintiff in the equity suit must show in his bill that he was not guilty of negligence or laches—to excuse his failure to defend at law.

3d. That he must show due diligence—and the facts alleged (and proved) must be inconsistent with the least neglect.

4th. That he must show that he had in vain exhausted his remedies at law. This is a general principle in equity.

5th. He must show affirmatively in his pleadings why he had not previously discovered the fraud which he alleges, and when and how he did discover it.

Mr. John J. McHatton and *Mr. John O. Bender*, for Respondent.

“Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law; or of which he might have availed himself at

law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or of his agents, will justify an application of a court of chancery." (*Marine Insurance Co. v. Hodgson*, 7 Cranch (U. S.) 332; *Crim v. Handly*, 94 U. S. 657.) "In all these cases and many others which have been examined relief has been granted on the ground that by some fraud practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court." (*United States v. Throckmorton*, 98 U. S. 61.) In *Borland v. Thornton* (12 Cal. 440) and in *Riddle v. Baker* (13 Cal. 295), the rule governing cases of this character is clearly laid down. (*Spencer v. Vigneaux*, 20 Cal. 442.) "Fraud in concealing from the complainant a good and valid defense to the action will entitle an injunction against a judgment that is contrary to conscience, where complainant has not been guilty of negligence." (*Merriam v. Walton*, 30 L. R. A. 786, notes and cases cited.) "In *Norman v. Burns*, 67 Ala. 248, it was said that if the defense was prevented by fraud, accident or surprise, or the act of the adversary, and the judgment is unjust, it would be enjoined. And where the defense was that the bill in suit was a forgery, and the excuse for not defending at law was that there was a similar genuine bill which was believed to have been the one in suit and which was not discovered until after judgment. (*Farrel v. Allen*, 5 W. Va. 43; *Norwegian Plow Co. v. Bollman*, 31 L. R. A. 747, notes and cases cited.) Where there is a fraudulent suit by a party, who is not the real party in interest, in order to prevent a defense, and it is not discovered until after judgment, an injunction will be granted. (*Hickerson v. Raiguel*, 2 Heisk. 329; *Stovall v. Northern Bank*, 5 Smedes & M. 17; *Davis v. Tilsen*, 47 U. S., 6 How. 114, 12 L. Ed. 366; *Greenleaf v. Maher*, 2 Wash. C. C. 393; *Goad v. Hart*, 8 Smedes & M. 787; *Dady v. Brown*, 76 Iowa 528; *Marchman v. Sewell*, 93 Ga. 653.) The court has jurisdiction in a subsequent action to set aside a judgment obtained by fraud. (*Cole v. Langford*, (1898) 2

Q. B. 36, 67 L. J. Q. B. N. S. 698.) One against whom a final judgment has been rendered may by a direct proceeding for that purpose have the case reopened upon averments that he was prevented from making a valid defense by fraud, accident or the act of the adverse party, unmixed with negligence on his part. (*Hammond v. Atlee*, 39 S. W. 600; 15 Tex. Civ. App. 267.) A court of equity will vacate a judgment in a proper proceeding and grant a new trial, where it appears that the judgment depends for its support on the perjured evidence of the successful party given at the trial, that the defeated party had a valid defense, which he was prevented from establishing by such perjury, and he had not been guilty of negligence and has exhausted all his ordinary legal remedies for obtaining the vacation." (*Munro v. Callahan*, 75 N. W. 151; 55 Neb. 75, citing *Graver v. Faurot*, 46 U. S. App. 268; 76 Fed. Rep. 257, 22 C. C. A. 156; *Laithe v. McDonald*, 12 Kan. 340; *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93; *Ward v. Southfield*, 102 N. Y. 293; *Asbury v. Frisz*, 148 Ind. 513, 47 N. E. 328.) These temporary injunctions rest largely in the discretion of the district court. (*Nelson v. O'Neill*, 1 Mont. 284; *Atchison v. Peterson*, 1 Mont. 561; *Mining Company v. Murray*, 9 Mont. 475; *Klein v. Davis* 11 Mont. 155; *Anaconda Mining Co. v. B. & B.* 17 Mont. 519; *Red Mountain Consolidated Mining Co. v. Esler*, 18 Mont. 174; *Bennett Bros. Co. v. Congdon*, 50 Pac. 556.)

MR. JUSTICE PIGOTT delivered the opinion of the Court.

In the spring of 1892 the plaintiff, O'Rourke, sold to the defendant, Mary Schultz, an undivided fourth interest in the Western Star Brick Yard & Brick Works for \$2,500; the entire property was subsequently transferred to a corporation; with the consent of all concerned, one-fourth (2,500) shares of the corporate stock was duly delivered, by certificates representing the stock, in lieu of the one-quarter interest in the property itself, all the terms of the agreement of sale and purchase being applicable to the contractual rights as thus

immaterially modified. By the terms of the contract the purchaser, Schultz, was entitled, if dissatisfied with the investment or the business at the end of one year from the date of the contract, to demand and receive from the seller, O'Rourke, the amount of the purchase price, and O'Rourke, upon making such repayment, was entitled to a retransfer of the property sold. Conformably to the agreement, Schultz requested repayment, and offered to return the stock representing the property sold to her, and, upon the refusal of O'Rourke to comply with the demand, Schultz brought an action and recovered a judgment therein against him for the sum of \$3,168, which judgment was affirmed by this Court. (*Schultz v. O' Rourke*, 18 Mont. 418, 45 Pac. 634.)

The present action was instituted by the judgment debtor, O'Rourke, to restrain his judgment creditor, Schultz, from enforcing the judgment in *Schultz v. O' Rourke*; it being asserted in his behalf that it was obtained by fraud, and that he was prevented by the deceit of the plaintiff in the former action from presenting and proving in defense some of the matters now relied upon by him, and also that some of the other matters now urged were not material to any of the issues made therein. Upon the hearing of an application for an injunction *pendente lite*, the court below granted such injunction, and from the order in that behalf Schultz, the defendant, appeals.

Although the record is somewhat long, and the facts to be deduced therefrom not readily apparent, and although many questions have been fully discussed in the briefs and at the bar, the only question which deserves very serious consideration is whether at the time the judgment was rendered in *Schultz v. O' Rourke*, requiring O'Rourke to repay to Schultz the agreed purchase price, she was able to comply with the requirement of that judgment, by transferring to O'Rourke the shares of stock which then represented the property sold by O'Rourke to Schultz.

In the action which resulted in the judgment whose enforcement is now sought to be enjoined, O'Rourke, the defendant

therein, contended that Schultz, the plaintiff in that action, should have made to the defendant therein a formal tender of the stock before trial, and that the failure to allege and prove such tender constituted a fatal defect in the plaintiff's case; but this Court held that no such tender was necessary, as the covenants between the parties were mutual and dependent, and the performances thereunder were to be simultaneous, and that, even if such a tender had been required, the defendant, O'Rourke, had waived the production of any certificate of stock, or its absolute formal tender, either before or at the trial,—though perhaps an offer to retransfer the shares conditionally upon the simultaneous repayment of the purchase price to her was necessary to be made at the trial. But, notwithstanding these rulings by this Court in the former case between these same litigants, the necessity for such tender is now again earnestly urged by O'Rourke, the present plaintiff, and is treated even by Schultz as a proper subject for further discussion. As this Court does not contemplate the rehearing of the former appeal, and as the views heretofore announced will be adhered to, we here quote and repeat with approval a portion of the opinion: "The question of tender is by far the most important point in the case. * * * From this evidence we do not think that there ever was a formal actual tender of any stock after March 29, 1893, until the trial. The tenders made before that time were not good, because under the terms of the contract itself the defendant was not obliged to return to her the \$2,500 invested until the expiration of one year. All such tenders were premature. * * * The covenants of the agreement were mutual and dependent. If she were dissatisfied at the end of the year, then and in that event defendant agreed to refund to her the \$2,500 she paid for her interest in the business, and she in turn agreed to reconvey to him such interest. The performances were to be simultaneous. That she was dissatisfied, and expressed such dissatisfaction to defendant, is indisputably proven. Such being the case, is it not a fair construction of the contract to say that, when she made known that dissatis-

faction, it devolved upon defendant to pay or offer her the \$2,500 agreed to be paid, and thereupon it at once became her duty to reconvey to him? We think so. There was no express covenant on plaintiff's part to tender, and it would seem that, where the covenants between the parties were mutual and dependent, the necessity of strict formalities by a tender before trial ought not to have been imposed upon plaintiff. * * * But, granting that plaintiff ought to have actually presented the certificate of stock to defendant after March 29, 1893, we think that the acts and declarations of defendant dispensed with greater formality than was observed. * * * There is ample justification to infer that the production of the certificates and their formal tender was waived. It was, therefore, unnecessary to offer the certificates themselves, as the law, under such circumstances, does not require a man to perform a nugatory act." We shall not, therefore, consider any of the evidence or arguments which seem to rest upon the expected re-examination of the alleged right to have the stock certificates transferred, or offered to be transferred, by Schultz, as a condition precedent to her right to maintain an action for the purchase price thereof; that question has been finally adjudicated in this Court.

Having heretofore determined, and now reaffirmed, the right of Schultz, upon the pleadings and proofs involved in the former action, to recover the judgment now attacked, we approach the consideration of the present case with a full appreciation of the unusual and extraordinary nature of the relief sought; for the plaintiff, O'Rourke, having had his day in court as defendant in *Schultz v. O'Rourke*, is manifestly required to show very substantial reasons for invoking the aid of the courts to the end that he may be protected from the enforcement by writ of execution of a demand already formally and finally adjudged to be payable by him.

What, then, are the circumstances which are supposed to justify the judgment debtor in resisting the judgment, and in asking the Court to enjoin its enforcement? This Court, in

the concluding paragraph of the opinion handed down in the former case, said: "Our conclusion upon the whole case is that the plaintiff is entitled to the sum found to be due her by the district court, and that upon payment of such sum defendant is entitled to 2,500 shares of stock tendered and left with the clerk of the court, and agreed to be transferred by plaintiff under the contract." The judgment debtor, O'Rourke, now claims that Schultz was not the owner of the contract of sale at the time when the judgment was rendered for the payment of the amount due under that contract; that she was not then, nor had she been for a long time prior thereto, the owner of 2,500 shares, and could not, therefore, comply with her covenants, nor with the requirements of the judgment itself; that the certificate of stock left with the clerk of the district court for O'Rourke was and is void, and that it would be inequitable and against conscience to permit the judgment to be executed, when the obligations of the judgment creditor have not been performed and cannot be enforced; and the plaintiff further insists that he was prevented from presenting these defenses in the other action by reason of the false representations of the plaintiff in that, and defendant in this, action.

1. The first cause of action stated is, in substance, that Schultz has a judgment against O'Rourke for \$3,168, and that O'Rourke has a judgment against Schultz for \$693 in the same court; and that Schultz is insolvent. The relief prayed is that the smaller judgment be set off *pro tanto* against the larger. To this statement a demurrer for insufficiency was interposed and sustained. Whether or not the order sustaining it was right is not before this Court, since the only exceptions which may be considered are those taken by, or preserved to, the appellant, who is the party claiming to be aggrieved by the order or judgment of the court below. (*Buck v. Fitzgerald*, 21 Mont. 482, 54 Pac. 942.)

2. Whether or not Schultz during the pendency of *Schultz v. O'Rourke* assigned the contract of sale to one Fanny Matusevitz, either in pledge, or so as to transfer the general own-

ership, or otherwise, is not material, in so far as O'Rourke is concerned. If he had no knowledge that an assignment had been made, he was justified in continuing to regard Schultz as the only person other than himself who was interested in the contract, the performance of the conditions of which was due to Schultz from him, and from her to him; fulfillment upon his part of its covenants would work his discharge, and the recovery of a judgment fixing liability would prevent the maintenance of an action by Matusevitz upon the contract. At the time the former action was commenced, May 23, 1893, Schultz was, for aught that appears to the contrary, possessed of the same interest in the contract that she had when it was made; the assignment was executed on or after June 14, 1894, and pending the suit, and under such circumstances the action could be continued in the name of Schultz notwithstanding the assignment, for Section 22 of the Code of Civil Procedure (Compiled Statutes of 1887) declares that in case of a transfer of interest pending suit the action "may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted." Moreover, the original contract itself, with the assignment to Matusevitz thereon endorsed, constituted part of the plaintiff's proof in *Schultz v. O'Rourke*, was received in evidence at the trial, and was subject to the inspection of O'Rourke, whose duty it was at the time to make the objection now urged, or apply for a substitution of Matusevitz for Schultz as plaintiff. Having done neither, he may not now be heard to interpose the objection, for he has waived it by remaining silent when he might have spoken. We are not to be understood, however, as intimating, much less as deciding, that the written assignment, of itself, was, under the circumstances, as between O'Rourke and Matusevitz, notice to O'Rourke sufficient to charge him with knowledge that Matusevitz had become the successor to Schultz's rights in the contract.

3. O'Rourke alleges in his complaint, and asserts that he has proved, that when the judgment was rendered Schultz was not the owner of 2,500 shares of the stock, and that the cer-

tificate delivered to the referee, and by him deposited with the clerk of the district court, was and is void. He contends with plausibility and force that as the obligations of the several parties to the contract of sale were held by this Court to be mutual and dependent, and the performances thereof were required by the contract and also by the judgment to be simultaneous, it would be inequitable to permit Schultz to collect her judgment against O'Rourke if it should appear that she was then, and ever since has been, unable to discharge her own obligation, arising out of the same contract, to retransfer the shares. We are inclined to agree with this contention, and, if the proofs sustained his allegations, we should deem it our duty to sanction the protection which the court below has endeavored to afford O'Rourke against the supposed failure of Schultz to discharge her obligations as recognized in the judgment given in her favor, and by which her discharge of those obligations was declared to constitute a right of O'Rourke maturing simultaneously with his discharge of his obligations to her thus adjudicated.

We are unable, after an examination of the record, to find in the evidence any substantial support for the allegations of O'Rourke touching Schultz's relation to the stock issued by the corporation in which they both became interested under the circumstances disclosed by the proofs in the former case. Analysis of the stock book and the testimony shows indisputably that the only shares which were ever issued were issued and disposed of as follows, the corporation having been organized in April, 1892: On April 12, 1892, 20 certificates, each for 500 shares, and amounting in all to 10,000 shares, were issued; certificates 1, 2, 3, 4, and 5, representing 2,500 shares, were issued to one Carl Schultz, the husband of Mary Schultz, the former plaintiff and present defendant; certificates 6, 7, 8, 9, and 10, for 2,500 shares, were issued to John O'Rourke; certificates 11, 12, 13, 14, and 15, for 2,500 shares, were issued to one Lisker; and certificates 16, 17, 18, 19, and 20, for 2,500 shares, were issued to one Le Claire. Although the authorized capital stock of the corporation

justified the issuance of 20,000 shares, each having the par value of \$1, no greater issue at any one time than 10,000 shares appears from the records, and, consistently with the agreement of the parties, one-fourth of this total issue, namely, 2,500 shares, was issued immediately after the incorporation to Carl Schultz, the husband of Mary Schultz, who had purchased a one-fourth interest in the property then held by the corporation. It may be observed that the 2,500 shares issued to Lisker have never been transferred, and are being now still owned by him, they may be eliminated from all further investigation as to subsequent transfers or changes of ownership; and we have therefore to deal only with the 2,500 shares originally issued to Carl Schultz, the 2,500 shares originally issued to John O'Rourke, and the same number issued to Le Claire. Pursuing the inquiry chronologically, we find that on April 23, 1892, certificate 21, for 2,400 shares, was issued to Le Claire, and certificate 22, for 100 shares, was also issued to the same person, certificates 16, 17, 18, 19, and 20, formerly issued to Le Claire, being simultaneously canceled, and his holding being in no way modified by the new issue; on the same day, however, certificate 21, for 2,400 shares, was canceled, and certificate 23, for a like amount of shares, was issued to one Davis, trustee, thus still preserving the total amount of the original issue. At the close of that day the stock holdings, as disclosed by the certificates, were, therefore, as follows: Lisker, 2,500 shares; Carl Schultz, 2,500 shares; John O'Rourke, 2,500 shares; Le Claire, 100 shares; and Davis, trustee, 2,400 shares,—a total of 10,000 shares, as before. On June 6, 1892, certificates 6, 7, 8, 9, and 10, for 2,500 shares, originally issued to John O'Rourke, were canceled, and five new certificates, numbered 24, 25, 26, 27, and 28, each for 500, and amounting in all to 2,500 shares, were issued to one Fransman, the transaction constituting a mere transfer of the original O'Rourke shares to Fransman. On the same day certificates 1, 2, 3, 4, and 5, issued to Carl Schultz for 2,500 shares, were canceled, and new certificates 29, 30, 31, and 32, for 500 shares each, and

certificate 33, for 475 shares, were issued to Mary Schultz, and certificate 34, for 25 shares, was issued to Carl Schultz,—making a total reissue of 2,500 shares; the transaction being simply a transfer from Carl to Mary of 2,475 of the shares originally issued to him, and still preserving the issue of 10,000 shares; the holdings at the close of that day being, as shown by the certificates: Lisker, 2,500 shares; Fransman, 2,500 shares; Mary Schultz, 2,475 shares; Carl Schultz, 25 shares; Le Claire, 100 shares; and Davis, trustee, 2,400 shares. On June 16, 1892, we find that the shares represented by certificates 24, 25, 26, 27, and 28, which had theretofore been issued to Fransman, each for 500 shares, and amounting in all to 2,500 shares, and which had been transferred to Fransman by John O'Rourke, were canceled, and new certificates 35, 36, 37, 38, and 39, each for 500 shares, and amounting in all to 2,500 shares, were issued to one Thomas O'Rourke,—the transaction being merely a transfer of the Fransman stock to Thomas O'Rourke, and still preserving the original total issue of 10,000 shares; the stock holdings at the close of that day, as represented by certificates, being: Lisker, 2,500 shares; Thomas O'Rourke, 2,500 shares; Mary Schultz, 2,475 shares; Carl Schultz, 25 shares; Le Claire, 100 shares; and Davis, trustee, 2,400 shares,—a total of 10,000 shares, as theretofore. There seems to have been no change in the stock issue after June 16, 1892, until October 15, 1893, when certificate 23, issued theretofore to Davis, trustee, for 2,400 shares, was indorsed by Davis, surrendered and canceled, and certificate 22, theretofore issued to Le Claire, was surrendered and canceled, and the stubs show that they were reissued to Matusevitz on October 15, 1893, though neither of the stubs specifies the number of the subsequent certificate by which the reissue was made. Manifestly this transfer of the Le Claire 100 shares, and the Davis, trustee, 2,400 shares, to Matusevitz, did not materially change the stock holdings, nor alter the total issue of 10,000 shares. The only certificate shown by the record to have been issued thereafter is certificate 40, the stub of which

shows that it was issued to Matusevitz for 2,500 shares on July 24, 1894, and we are forced to conclude that this certificate is a reissue of certificates 22 and 23, which had theretofore been issued, respectively, to Le Claire, and Davis, trustee, and thereafter canceled, the stubs of which disclose that the stock represented by these certificates was reissued to Matusevitz, and hence we must believe that on July 24, 1894, the holdings, as shown by the certificates, were: Lisker, 2,500 shares; Thomas O'Rourke, 2,500 shares; Mary Schultz, 2,475 shares; Carl Schultz, 25 shares; and Matusevitz, 2,500 shares. We note that the stub of certificate 40, then owned by Matusevitz, as heretofore shown, explained that this certificate was surrendered by her, canceled, and reissued on July 25, 1894, to John O'Rourke, for 2,500 shares, but the stub does not show the number of the new certificate under which the reissue was made, nor does the record contain either the new certificate or its stub, but as the evidence does show that a certificate for 2,500 shares in the name of John O'Rourke was delivered to the referee, and by him lodged with the clerk of the district court, the inference is warranted that this refers to the old assigned certificate, No. 40, or that the new certificate, if issued, is numbered 41; and as certificate 40 had been therefore lawfully issued to Matusevitz, and had been transferred by her to O'Rourke, we are at least constrained to the conclusion that she was entitled to demand the issuance of a proper certificate to her assignee, and that such certificate issued to O'Rourke, as the transferee of Matusevitz, would have involved no improper exercise of power by the executive officers issuing it, and even if the paper representing these shares, and which is called a "stock certificate," was not signed by the proper officer of the corporation, nevertheless the assignment of 2,500 shares by Matusevitz to O'Rourke would at the least invest in him the right to have such a certificate properly issued, and would meanwhile transfer to him the full ownership of the shares which would be represented by that certificate when duly issued.

The foregoing is a correct chronological statement of all of

the stock issues of the corporation, although there are some transfers by indorsement, (so called) not yet referred to, because not represented by issues of new certificates, and some difference of opinion may exist as to what particular prior issues are represented by subsequent issues; but, however essential these details may be to a complete narration of the stock transactions, they do not materially modify the relations of the parties to the stock holdings, nor do they affect the rights of the parties to this action. That we may not seem to have overlooked any of the features of the case, we deem it not improper to review briefly the other circumstances which are regarded as significant and important by O'Rourke. The O'Rourke stock may now be eliminated, as the Lisker stock has already been, from all further investigations, as O'Rourke's shares were merely transferred and reissued to Fransman, and then transferred and reissued to Thomas O'Rourke, no dispute concerning any of these issues or reissues having arisen.

Certificates 1 to 5 were originally issued to Carl Shultz, and 16 to 20 to Le Claire; no suggestion has been made involving a controversy as to the regularity of either of these issues. Certificates 1 to 5, for 2,500 shares, were surrendered by Carl Schultz, canceled and reissued under certificates 29 to 33, for 2,475 shares, in the name of Mary Schultz, and certificate 34, for 25 shares, in Carl's name; there is no serious dispute as to the regularity of this transfer and reissue. Certificates 16 to 20, for 2,500 shares, originally issued to Le Claire, were surrendered and reissued under certificate 22 for 100 shares, in his name, and certificate 23 for 2,400 shares in the name of Davis, trustee, both of said certificates and the shares represented by them being then pledged to Davis, trustee, as security for the payment of a loan to Le Claire; this seems also to constitute neutral territory, and not to involve any dispute concerning the regularity of the proceedings or the rights of the parties. The subsequent transfers and transactions, however, seem to be regarded by O'Rourke as tending to establish the averments of his com-

plaint. Mary Schultz, as owner and holder of certificates 29 to 33, amounting to 2,475 shares, indorsed them to her sister, Matusevitz, and Carl Schultz, as owner of certificate 34, for 25 shares, assigned 23 of them to Matusevitz; it is insisted by the appellant, Mary Schultz, that these two transfers are represented by a reissue to Matusevitz under certificate 40, for 2,500 shares, while the respondent, O'Rourke, contends that certificate 40 represents other stock assigned to her. As the total number assigned to Matusevitz under certificates 29 to 34 is only 2,498 shares, and as the number represented by certificate 40 is 2,500 shares, we concur in respondent's view, and conclude that certificate 40 represents (whether in whole or in part is of no importance upon this appeal) the original Le Claire stock, which was represented by certificates 16 to 20, and was subsequently issued by certificates 22 and 23, and pledged to Davis, trustee. It should seem, therefore, that Matusevitz became the assignee of all the original Schultz stock, excepting two shares, although no new certificates were issued to her for them, and became the assignee of all the original Le Claire stock, and received certificate No. 40 for the Le Claire shares. It may possibly be that certificate 40 represents all of the shares (2,498) assigned to Matusevitz under certificates 29 to 34, and also two shares only out of the original Le Claire stock; in any event, at least two of the Le Claire shares must necessarily have been reissued by certificate 40 for 2,500 shares.

Under these circumstances, O'Rourke claims, in the first place, that Mary Schultz did not own shares of stock at any time during the pendency of the former suit, and therefore could not transfer 2,500 shares to him in fulfillment of her obligations; and, in the second place, that, if she did own 2,500 shares at one time during the pendency of that action, they were levied upon and sold while the action was pending, under execution issued out of a justice's court upon a judgment against Mary and Carl Schultz. Since there is no conflict in the evidence relating to this subject, it becomes our duty to ascertain whether the inferences that may reasonably be

deduced from the undisputed facts justify the order of the court below.

Matusevitz did not testify in the case at bar, but the records of the corporation show that 4,998 shares of stock, represented by regularly issued certificates, were duly assigned to her by the holders of the stock. The corporation has in no way questioned the regularity of the proceedings by which these issues or transfers were made, nor has any one testified to facts which might suggest a well-founded doubt as to the regularity of the transfers to her, though counsel indulge in vigorously expressed suspicions respecting the purpose for which the transfer of the Schultz stock to Matusevitz was made; and also pronounce certificate 40 to be a forgery, because the person who signed it as secretary was not lawfully elected to that office, thus seemingly overlooking the fact that, if the transfer of the shares to her was valid, no irregularity whatever in the mere issuance of the paper certificate could affect her rights or lessen the extent of her ownership.

After an exhaustive examination of the transcript, we find no evidence tending to create a substantial doubt as to the accuracy of the corporation's records in the particulars mentioned, and from them it appears that at the time when the former suit was commenced, and ever since April, 1893 (possibly since February of the same year), the legal title to the original 2,500 Schultz shares of stock, excepting the two shares retained by Carl Schultz, was and has been in Matusevitz. Without, therefore, considering the regularity or legal sufficiency of the proceedings on the execution against the property of Mary Schultz, we must conclude that they did not affect the 2,498 shares which had been duly assigned to Matusevitz in February or April, 1893, and which from that time stood on the records of the corporation in her name. Neither could they reach, had the attempt been made to do so, the 2,500 shares transferred to her in October, 1893, and ultimately represented by certificate No. 40, and likewise standing in her name on the books of the corporation.

The respondent, O'Rourke, further contends, however, that

Matusevitz did not succeed to the ownership of the Le Claire stock which was pledged to Davis, trustee, and in support of this contention he claims that, while it is conceded that the pledgee's lien was legally enforced, and the pledged stock properly sold by auction to Carl Schultz, he was unable to transfer title to Matusevitz, because the purchase at the pledgee's sale was made with the understanding that O'Rourke was to become entitled to an equal one-third interest in the Le Claire stock then purchased, he to pay his equal proportion of the purchase price thereof. The record shows that this stock was transferred to Matusevitz, and, while counsel differ as to who purchased and who paid for the stock, no attempt has been made to show that Matusevitz had ever heard of the agreement among Lisker, Carl Schultz, and O'Rourke concerning O'Rourke's supposed interest in that purchase; nor was the evidence sufficient to charge Mary Schultz with such knowledge, even conceding that her knowledge of the agreement would be an important item; and hence, in the absence of any proof to the contrary, we are, of course, obliged to conclude that Matusevitz became the legal owner and assignee of these shares, as shown by the books of the corporation. Furthermore, we cannot appreciate the alleged strength of respondent's application for relief to a court of equity, in so far as it rests upon the right to have an undivided one-third interest in the stock, when he does not pretend to have ever paid or contributed any portion of the purchase price to any person.

We conclude, therefore, that on and after October 15, 1893, the outstanding and issued shares of the corporation stock were held as follows, as shown by the records of the corporation: Lisker, 2,500 shares; Thomas O'Rourke, 2,500 shares; Matusevitz, 4,998 shares; and Carl Schultz (or his successor in title under execution sale), 2 shares.

In these circumstances, the present defendant and appellant, Mary Schultz, as plaintiff in *Schultz v. O'Rourke*, filed with the referee in that case a certificate numbered 40, for 2,500 shares, issued to Matusevitz, and indorsed by her to O'Rourke,

which certificate so indorsed and assigned was subsequently filed with the clerk of the district court for the benefit of O'Rourke, then the defendant, but now the plaintiff. The respondent contends that this certificate was issued through some questionable proceedings whereby the secretary of the corporation was removed and a new secretary elected, and he therefore claims that the certificate is irregular and void. In making this contention he has overlooked the fact, already adverted to, that the certificate is a mere muniment of title, and that if Matusevitz was the owner of the 2,500 shares mentioned in that certificate, as we think she was, no defect in the certificate would impair her ownership of those shares, or his right thereto as her assignee. Respondent has overlooked also the further fact that, when these shares of stock and the certificates representing them were offered at the former trial, he refused them for reasons other than the supposed defects in the certificate, although the certificate bore upon its face sufficient to notify him of the defects of which he now complains. Having the opportunity and means of knowledge at hand, he should have pointed them out at the time. In the opinion rendered in the former suit this language was used: "Upon the trial there was a formal tender of 2,500 shares, indorsed in blank, it appears, and a demand of the return of \$2,500 paid for the stock. * * * No objection was made to the sufficiency of the tender or to its form, except that the stock was attached, as defendant was informed. The defendant cannot now urge any reason for refusing the stock offered on the trial, other than that expressly relied on. He is held to have waived the objections that plaintiff did not have the stock in her own name. * * * The identical shares originally made over to her were not necessarily the only shares which she could return to defendant. As said, one share was as good as another, and represented the same interest in the property." The 2,500 shares offered to O'Rourke by Mary Schultz had not been attached, nor had any attempt been made to reach or to sell them, and, if this record correctly discloses the condition of the corporation's stock,

O'Rourke was and is entitled to have stock certificate 40 canceled, and a new certificate issued to him for 2,500 shares, in strict conformity to the agreement between him and Mary Schultz, and in fulfillment of her obligations to him as declared in the judgment rendered in the former action. If O'Rourke has been deprived by Carl or by Mary Schultz, or by both of them, of the right to share equally in the benefits and bear proportionally the burdens arising from the purchase of the Le Claire stock, he may be able to obtain adequate relief in some appropriate action or proceeding for that purpose, but his proofs in the present case certainly make no such showing as would entitle him to charge with this supposed equity the 2,500 shares owned by Matusevitz, and acquired by her free from such equities, and decline to receive them from Mary Schultz (who is not shown to have had knowledge or notice of the arrangement by which Carl Schultz purchased the Le Claire stock for the benefit of Lisker, himself, and O'Rourke) in discharge of her obligations to him. We have already repeated the language of the opinion in the former case: "The identical shares originally made over to her were not necessarily the only shares which she could return to the defendant. As said, one share was as good as another, and represented the same interest in the property;" and such is the law of the case. In further illustration of this manifest truth, we may say that if Schultz had purchased or otherwise acquired the 2,500 shares owned by Lisker, and offered them to O'Rourke, he could not have refused them; and with equal force it may be said that one share is no worse than another, and that, therefore, the offer of the Matusevitz shares constituted as complete a compliance with the conditions of her contract as the offer of other shares derived from a different source.

Restricted, as we must be, in our inquiry, to the contents of the record before us, we can discover in this case no facts which justified the district court in restraining the execution of the judgment heretofore made by it and affirmed by this Court. The order appealed from is therefore reversed, and the cause remanded.

Reversed and remanded.

TUOHY'S ESTATE, PAUWELYN, EXECUTOR,
APPELLANT.

[No. 1,480.]

ON MOTION TO DISMISS APPEAL.

[Decided October 26, 1899.]

*Appeal in Probate Proceedings—Order Directing Execution of
Lease—Statute.*

1. An appeal is authorized by statute only, and, unless the subject matter of an appeal falls fairly within the statute, the appeal does not lie.
2. Under Code of Civil Procedure, Section 1722, as amended by Session Laws 1899, p. 146, providing that appeals may be taken (Subdivision 1) from all final judgments (subdivision 2), from orders granting or refusing new trials, orders in extraordinary proceedings, interlocutory orders, and special orders after judgment, and (Subdivision 3) from judgments or orders in probate proceedings, appeals from judgments and orders in probate proceedings are only allowable under Subdivision 3, except in the granting or refusing a new trial, which may be taken under Subdivision 2.
3. Under Code of Civil Procedure 1895, Section 1722, as amended by Sess. Laws 1899, p. 146, an order of the district court directing an executor to execute a lease of certain realty belonging to his testator's estate, is not a "final judgment in a special proceeding" from which an appeal will lie. (*In re McFarland's Estate*, 10 Mont. 446, and *In re Higgins' Estate*, 15 Mont. 475, distinguished.)
4. Under Code of Civil Procedure, Section 1722, Subdivision 3, as amended by Sess. Laws 1899, p. 146, providing that appeals may be taken from orders directing a conveyance of realty in probate proceedings, an appeal will not lie from an order directing the execution of a lease of realty, as "conveyance," as used in the statute, does not include a lease.

*Appeal from District Court, Silver Bow County; John
Lindsay, Judge.*

PROCEEDING in the estate of James Tuohy, deceased. From an order directing Cyril Pauwelyn, executor, to execute a lease of certain realty, he appealed. One McSherry and another, who were made respondents, moved for a dismissal of the appeal. Dismissed.

Messrs. Pemberton & Maury, for Appellant.

Mr. W. I. Lippincott and *Mr. D. Gay Stivers*, for Respondents.

PER CURIAM. Motion to dismiss appeal. Cyril Pauwelyn, as executor of James Tuohy, deceased, seeks herein to have

23	305
24	50
25	283
26	283
27	244
28	305
29	305
30	305
31	359
32	305
33	340
34	340
35	305
36	202

reviewed on appeal an order made by the district court of the Second Judicial District, sitting as a court of probate, directing him to execute a lease of certain mining ground belonging to his testator's estate to C. J. McSherry and D. J. Ryan at a fixed rental for the term of two years. McSherry and Ryan, who are made the respondents, ask that the appeal be dismissed on the ground, among others, that the order is not appealable.

An appeal is authorized by statute only and, unless the judgment or order which it is sought to have reviewed in this mode falls fairly within the enumeration of appealable orders or judgments made by the statute, the appeal does not lie. (Hayne on New Trial & App., Sec. 181.) Appeals from district courts in this regard are provided for in Section 1722 of the Code of Civil Procedure, as amended by the Session Laws of 1899, p. 146. Under this section we find three classes of judgments or orders from which appeals may be taken. Subdivision 1 includes all final judgments; subdivision 2 enumerates orders granting or refusing a new trial, orders made in extraordinary proceedings, interlocutory orders and special orders after final judgment; subdivision 3 enumerates judgments or orders in probate proceedings. This section was copied into our Code substantially from the Code of California. Though appeals are provided for therein not recognized by the Code of that state, the theory of classification is the same in both Codes. (*Estate of Calahan*, 60 Cal. 232.) The case cited involved the question whether an appeal lies from an order vacating a decree of distribution. The court observes: "It is quite clear that the first and second classes embrace judgments and orders other than those made in probate proceedings, and that the third class embraces only such as are made in such proceedings." The order was held to be nonappealable, because not enumerated among those declared in that class to be appealable. It was also held in that case that this order is not included in the second class, under the head of "any special order made after final judgment," for the reason that the final judgment there mentioned refers to

the judgment mentioned in the first class, that is, "a final judgment entered in an action or special proceeding commenced in a district court, or brought into a district court from another court." In a later case (*In re Smith's Estate*, 98 Cal. 636, 33 Pac. 744) in considering the same statute, it was determined that the term "final judgment," as used therein, "applies only to those judgments known at common law as 'final judgments,' and that as to the statutory determinations termed 'orders or judgments,' defined in the third subdivision, the term 'final judgment' does not apply." Similar questions under this statute have been considered in the following cases by the same court: (*In re Walkerly's Estate*, 94 Cal. 352, 29 Pac. 719; *In re Dean's Estate*, 62 Cal. 613; *In re Moore's Estate*, 86 Cal. 58, 24 Pac. 816; *In re Wiard's Estate*, 83 Cal. 619, 24 Pac. 45; *In re Lutz's Estate*, 67 Cal. 457, 8 Pac. 39; *In re Bauquier's Estate*, 88 Cal. 302, 26 Pac. 178, 532.) In this latter case it was held that an appeal from an order granting or denying a new trial lies under the provisions of the second subdivision, because this provision is made applicable to probate proceedings by a section of the title pertaining to probate procedure the same as is found in our Code of Civil Procedure in Section 2921.

These cases furnish support for the rule, which seems entirely reasonable, that appeals from judgments or orders in probate proceedings are allowed only under the provisions of subdivision 3, except in the single case of an order granting or refusing a new trial, which may be taken under subdivision 2, as provided by section 2921, *supra*.

Counsel for the executor cite *In re McFarland's Estate*, 10 Mont. 446, 26 Pac. 185, and *In re Higgins' Estate*, 15 Mont. 475, 39 Pac. 506, in support of the position that the order appealed from is a final judgment in a special proceeding, and therefore appealable under the first subdivision of section 1722, *supra*. They call attention to the fact that similar orders were in these cases held to be final judgments, and appealable, under Section 421 of First Division of the Compiled Statutes. It is sufficient to say of these cases that the Com-

piled Statutes contained no provision similar to the one under consideration. Moreover, up to the admission of the territory into the Union as a state, we had special probate courts, and no appeal to this Court lay directly from these courts. (*In re McFarland's Estate, supra.*) Orders and judgments made therein could be reviewed, in the first place, only in the district court. Upon the organization of the state government, probate jurisdiction was given to the district courts by the Constitution (Constitution, Art. VIII, Sec. 11; Schedule, Sec. 4), and thereafter appeals to this Court from judgments or orders in these proceedings were possible only by classifying them under the head of special proceedings, and allowing appeals, under Subdivision 1 of Section 421 of the First Division of the Compiled Statutes, which was by the Constitution continued in force, so far as applicable, to the new condition of things. Our present Code, while retaining the first subdivision of Section 421, *supra*, of the Compiled Statutes, makes special provision in section 1722, as we have seen, for appeals from judgments and orders made in probate proceedings, and thus renders obsolete the construction given to this subdivision in the two cases referred to. These cases are therefore no authority to support the contention of the appellant.

The order here considered is nowhere specifically mentioned in subdivision 3, unless it is included under the head of an order "against or in favor of directing the partition, sale or conveyance of real property," and whether it is provided for here turns upon the construction to be given to the word "conveyance." In the Civil Code, Section 1642, the term "conveyance for the purposes of recordation" embraces "every instrument in writing by which an estate or interest in real property is created, aliened, mortgaged or incumbered, or by which the title to real property may be affected, except wills." Under section 1641, leases for terms exceeding one year are required to be recorded. Therefore this class of leases falls within the meaning of "conveyance," as used in section 1642. But we apprehend that the term, as used in section 1722, *supra*,

is used in a more restricted sense, and falls within the definition of that term as applied to the actual transfer of the title to lands and interests therein, and does not include the hiring of real estate at a fixed rental for a term of years. The definition given to the term in the Civil Code, it seems clear, is to make plain the meaning of the provisions of that Code touching recordation, and is not designed to change the more restricted, technical meaning in which it is used in the books. In the Code of Civil Procedure, wherever the word is used, it seems to be used in this narrower sense. (Section 2640 *et seq.*) We find support for this view in the following authorities: *Mayor, etc. v. Mabie*, 13 N. Y. 151; *Des M. Co. Agr. Society v. Tubbessing*, 87 Iowa, 138, 54 N. W. 68; *Perkins v. Morse*, 78 Me. 17, 2 Atl. 130; *Sullivan v. Barry*, 46 N. J. Law, 1; *Kinney v. Watts*, 14 Wend. 38; *Tone v. Brace*, 11 Paige, 566; *Abendroth v. Town of Greenwich*, 29 Conn. 356. In *Sullivan v. Barry, supra*, the court say: "But neither the word 'convey' nor 'incumber,' according to its ordinary signification, is expressive of the act of creating a tenancy for years in lands. The former of the terms is appropriate to the transfer of a title to a freehold; the latter, to putting the property in pledge for the payment of money. That the word 'conveyance' does not, when standing without assistance in a statute, signify its applicability to the passing of a chattel interest in realty, is clearly indicated in the cases of *Kinney v. Watts*, 14 Wend. 38, and *Tone v. Brace*, 8 Paige, 598." (11 Paige, 566.)

We therefore hold that an appeal does not lie from the order in question, and that the appeal must be dismissed.

Dismissed.

O'ROURKE ET AL., RESPONDENTS, v. SHERMAN,
APPELLANT.

[No. 1,164.]

[Submitted October 25, 1899. Decided October 30, 1899.]

New Trial—Insufficiency of Evidence—Discretion of Trial Judge.

The Supreme Court will not disturb the discretion of the trial court in granting a new trial, on the ground that the evidence was insufficient to sustain the verdict, where the record discloses a substantial conflict as to material matters.

Appeal from District Court, Silver Bow County; J. J. McHatton, Judge.

ACTION by John O'Rourke and Daniel O'Sullivan against E. H. Sherman. There was a verdict and judgment for defendant, and a new trial granted on motion of plaintiffs. From the order granting new trial, defendant appealed. Affirmed.

Mr. John W. Cotter, for Appellant.

Mr. Chas. R. Leonard, for Respondent.

PER CURIAM.—Action to recover \$1,233.76, alleged to be due by defendant under the terms of a written lease between plaintiffs as lessors and defendant as lessee. Defendant denied the indebtedness and alleged a surrender of the lease and an assignment of all his interest therein, with plaintiffs' consent, and for the consideration of a release of his obligations thereunder, to the firm of T. J. Sherman & Co., of which firm defendant alleged plaintiff, O'Rourke, and defendant, and others were members. Trial to jury. Verdict and judgment for defendant. Plaintiffs' motion for a new trial upon the ground of the insufficiency of the evidence to sustain the verdict was granted. Defendant appeals from the order granting a new trial.

The record discloses a substantial conflict in the evidence as to material matters. The action of the trial court was therefore within the exercise of its sound discretion and cannot be disturbed by this Court. The order appealed from is affirmed.

Affirmed.

MONTANA MINING CO., LIMITED, ET AL., RESPOND-
ENTS, v. ST. LOUIS MINING & MILLING
CO. ET AL., APPELLANTS.

[No. 1,166.]

[Submitted October 23, 1899. Decided November 6, 1899.]

*Injunction—Action on Bond—State and Federal Courts—
Pleading—Judgment on the Pleadings—Damages.*

1. In an action in a state court on an injunction bond given in a federal court, conditioned to pay damages "If the court should finally determine that plaintiff was not entitled thereto," the complaint alleged a final determination of the injunction suit by a judgment dismissing the cause. The answer alleged, by way of avoidance, that a suit was pending in the federal court, involving the title to the property in controversy, but it did not allege that plaintiffs or defendants were interested therein. It also alleged that a suit by plaintiffs in the state court to determine the right to the property was also pending, but it did not allege that defendants had any interest in said suit. *Held*, that the answer did not show that the action was prematurely brought.
2. An injunction bond given in a federal court may be sued on in a state court without an order of the federal court granting leave when a final disposition of the injunction suit has been made by the entry of judgment of dismissal, with costs against the plaintiff.
3. Judgment on the pleadings is proper when the complaint is sufficient, and none of its material allegations are denied, and no affirmative matter alleged to defeat the action.

Obiter: Where judgment is rendered on the pleadings, it is not necessary, under Code of Civil Procedure, Sections 754, 1020, for the trial court to hear proof to determine the amount of damages.

*Appeal from District Court, Lewis and Clarke County;
H. C. Smith, Judge.*

ACTION by the Montana Mining Company, Limited, and others, against the St. Louis Mining & Milling Company of Montana, and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

STATEMENT OF THE CASE.

This action was brought to recover damages upon an undertaking on injunction executed by the defendants to the plaintiffs to indemnify them in a suit instituted by the defendant corporation against the plaintiffs in the circuit court of the United States, on September 16, 1893. The covenant of the undertaking is as follows: "Now, therefore, we, the undersigned, resident freeholders of the state of Montana, do undertake and promise to the effect that the plaintiff herein will pay to the said defendants so enjoined and restrained as aforesaid such damages, not exceeding the sum of one thousand (\$1,000) dollars, as such parties may sustain by reason of the injunction, if the court finally determine that the plaintiff was not entitled thereto."

The complaint alleges that on the 16th day of September, 1893, an action was brought by the defendant, the St. Louis Mining & Milling Company of Montana, against all the above-named plaintiffs in the circuit court of the United States, of the Ninth circuit, district of Montana; that a restraining order was duly issued out of said court on the 20th day of September, 1893, and served upon these plaintiffs; that under and by virtue of said order the plaintiffs, their agents, servants and employes, were enjoined and restrained from in any manner working, mining, excavating, or removing any ore from certain mining property situated in the county of Lewis and Clarke, state of Montana; that upon the issuance of said restraining order the defendant, St. Louis Mining & Milling Company of Montana, executed and filed in the office of the clerk of the circuit court the said bond or undertaking as required by the restraining order; "that thereafter such proceedings were had in said cause that the judge of said court on or about the 3d day of October, 1893, dissolved and set aside the said restraining order, and did finally adjudge and determine that the said defendant, the St. Louis Mining & Milling Company of Montana, was not entitled thereto"; that thereafter, on or about the 17th day of January, 1894,

the said cause was dismissed, and final judgment entered therein in favor of these plaintiffs and against the defendant, St. Louis Mining & Milling Company of Montana; that these plaintiffs, in obedience to said restraining order, were compelled to and did cease working and mining the property aforesaid from the 26th day of September until the 3d day of October, both days included; that the plaintiff, Montana Mining Company, Limited, was greatly injured and damaged by reason of the delay in working and mining said ground, and obtaining ore therefrom to keep its mill employed; that the said plaintiff was put to great expense in employment of counsel and the preparation of evidence to secure a dissolution of said injunction; and that the damages so suffered amounted to above the sum of \$1,000.

The defendants admit in their answer all the allegations of the complaint, and by way of avoidance, among other things, allege: "And these defendants aver that the said suit, wherein the said restraining order and injunction mentioned and set forth in the said complaint of the plaintiff, was for the purpose of preserving the property until the final determination of an action then pending in said court wherein the said injunction was granted, in which the title to said property was involved, and which has not yet been determined in said court. And they further aver that the said plaintiffs in this action, for the purpose of determining the question of the right to the said property, instituted an action in this Court, which said action is yet pending and undetermined in the Supreme Court of the State of Montana, and which action involves questions which are and may be tried, on an appeal from any decision that the said Supreme Court of the State of Montana may make therein, in the Supreme Court of the United States, by reason whereof none of the questions, according to the terms and conditions of the undertaking sued upon, have been finally determined, and this action is prematurely brought. Defendants, for further answer, show unto this honorable Court that no order was ever made by the said United States circuit court, or the judge thereof, authorizing

or justifying any suit or action upon the bond sued upon, by reason whereof the said action is prematurely brought, and on account whereof no recovery should or ought to be had therein."

After the filing of this answer, the plaintiffs moved the court for judgment on the pleadings, upon the two grounds: (1) That the answer contains no denial of the material allegations set forth in the complaint; and (2) that it does not state facts sufficient to constitute a defense or counterclaim thereto. This motion was granted, and the court, after hearing proof, rendered judgment against the defendants for the full amount of the penalty of the bond. From this judgment the defendants appeal.

Mr. Thomas C. Bach and *Mr. Edwin W. Toole*, for Appellants.

Assuming that the jurisdiction of the trial court is to be maintained under the decision of this Court heretofore made, the right to determine all legal propositions legitimately involved necessarily follows.

First. Among these we insist that this bond, having been given in an equity suit in the Circuit Court of the United States, the right to recover damages upon it depends upon the exercise of the discretion of that court, which is as much a condition of the bond as though expressed in it. Hence we claim that the right to recover the damages sought to be recovered should have been passed upon by the court in which the bond was required and executed. It was within the province of that court to require a bond or not, and equally within its province to determine whether an action should be maintained upon the same. This being a part of the conditions of the bond, can this Court dispense with the exercise of the discretion mentioned and try the rights of the parties under the conditions of the bond given conditioned in pursuance of the provisions of the statutes of the state of Montana? There was an action to determine the title to the property still pending, and it was an implied condition of the bond that leave to sue in

another jurisdiction should first be granted by the court in which the bond was given, *i. e.*, it will appear from the authorities that leave even to sue in the court in which it was given was necessary. This is eminently proper, as the court might say that the question as to the right of preliminary injunction is not yet finally determined, and that both action and order may be reinstated when the title question is ultimately settled. So this discretion was a material one, yet unexercised, and upon these points we cite the following cases: *Coosaw Min. Co. v. Farmers' Min. Co.*, 51 Fed. 107; *Brown v. Easton*, 30 N. J. Eq. 725; *Russell v. Farleigh*, 105 U. S. 433; *Meyer v. Block*, 120 U. S. 206; Foster Fed. Prac., 2d Ed., Sec. 237 and *bot. p. 236*; *Bien v. Heath*, 12 Howard U. S. 168; High on Injunctions, 3d Ed., Sec. 1656.

Hence, if the court had jurisdiction to try the case, the record shows that the discretion contemplated and order required were never made, and that the condition of the bond thus implied has never been broken. Giving the right to the Circuit Court of the United States, or the judge thereof, to define the conditions of the bond, we claim that there was no such determination of the rights of the parties as would justify a recovery in this action. It would seem, in all reason, to follow that the action being simply in aid of an action at law, and not to control the legal title to property, cannot be said to be a final determination until a final determination of the rights of the parties, in which the aid of the court of equity was invoked simply for the purpose of preserving the property during the litigation over its title. The court directed the execution of a statutory bond, as shown by the bond itself. The conditions expressed, as judicially interpreted, do not refer to a dissolution of the restraining order, but the final determination of the merits of the contention to which it is ancillary. Here it was to preserve the property, and the condition is that it must be finally determined that the plaintiff was not entitled to the injunction. The liability of the sureties is controlled by the recitals in the bond, and the presumptions follow that the United States courts intended the statu-

tory bond to receive the construction given it by the state courts. Whether it did or not, the sureties have a right to stand upon it. (*Palmer v. Foley*, 71 N. Y. 106.) The actions cannot be united in the United States courts, and by the terms of the bond, it is not finally determined until the action set up in the answer, in which it was in aid of, is finally determined. (*Clark v. Clayton*, 61 Cal. 634; *Dougherty v. Dore*, 63 Cal. 170; especially *Creek v. McManus*, 13 Mont. 152.) Here, as shown by the pleadings, there was pending a *main cause of action* involving the title to the property, and the temporary restraining order was simply to preserve it. (*Miles v. Edwards*, 6 Mont. 190; *Bein et al. v. Heath*, 12 Howard U. S. 168; High on Injunctions, Sec. 1656.) And upon this proposition we cite the following authorities: *Creek v. McManus et al.*, 13 Mont. 152, and the authorities and reasoning there used, *supra*; High on Injunctions, 3d Ed., Secs. 1640, 1656; *Jones v. Ross*, 29 Pac. 680; *Brown v. G. M. & S. Co.*, 4 *id.* 1016, bot. p.; *Stewart v. Miller*, 1 Mont. 301. Keeping the distinction in view, referred to in 13 Mont., *supra*, and it would seem this proposition is sound.

Messrs. Cullen, Day & Cullen, for Respondents.

MR. CHIEF JUSTICE BRANTLY, after stating the case, delivered the opinion of the Court.

1. Defendants contend that the judgment of the district court is erroneous, in that the action for injunction instituted by the defendant corporation in the circuit court of the United States, wherein the undertaking in question was given, was merely ancillary to an action at law then pending in the same court, and not yet determined, the object of which is to settle a controversy between the plaintiff and defendant corporations as to the title to the mining property involved; that the purpose of the injunction suit was to preserve the property pending the determination of the question of the ownership of it, and that the covenant in the undertaking has not been broken, because the circuit court has never finally deter-

mined this question adversely to the defendant corporation; and therefore that it was not entitled to have the injunction issued. They argue that, if the judgment is sustained, and hereafter, upon a termination of the suit at law in the circuit court, it be finally adjudged that the defendant corporation is the owner of the property, it will be demonstrated that they have been compelled to pay damages for which they should not in any event be held liable; therefore the suit cannot be maintained until the suit at law is finally determined adversely to the defendant corporation. To sustain this contention they cite *Palmer v. Foley*, 71 N. Y. 106; *Clark v. Clayton*, 61 Cal. 634; *Dougherty v. Dore*, 63 Cal. 170; *Creek v. McManus*, 13 Mont. 152, 32 Pac. 675; *Miles v. Edwards*, 6 Mont. 180, 9 Pac. 814; *Bein v. Heath*, 12 How. (U. S.) 168; High on Injunctions, Secs. 1640, 1656; *Jones v. Ross*, 48 Kan. 474, 29 Pac. 680; *Brown v. Galena M. & Smelting Co.*, 32 Kan. 528, 4 Pac. 1016; and *Stewart v. Miller*, 1 Mont. 301. Attention is also called to the procedure in the United States courts, under which legal and equitable relief cannot be had in the same action, but parties desiring extraordinary equitable relief in aid of an action at law must bring separate suits for that purpose, addressed to the equity side of the court. That this is so, however, they say, in no wise changes the rule that the main controversy must be finally determined before a suit can be maintained upon the undertaking. Conceding the law to be as they claim, this position is not tenable, under the pleadings in this case, for the reason that the affirmative matter set up in the answer falls far short of showing a case in which the rule can apply. It is alleged in the answer that a suit was pending in the circuit court involving the title to the property in controversy, and that it is still pending; but there is no suggestion that the plaintiffs in this case, or any of them, are in any wise interested in the event of it, or that they are parties to it. It is not even averred that any of the defendants are interested in it as parties or otherwise. It is alleged in the complaint, and not denied in the answer, that the injunction suit has been finally determined. No matter what

may be the condition of things with reference to the title and the litigation over it, nothing is stated in this regard in this case to show why this action should not proceed. The same may be said as to the action now pending in this Court on appeal. Nothing is alleged in the answer touching this to show that the defendants are interested in it. And, if there were, it would not aid the defendants, because the plaintiffs are actors therein.

2. The defendants argue, also, that the judgment was improperly granted, because it was discretionary with the circuit court to allow a suit to be brought upon an undertaking entered into under an order made by it, and that, as no order was made allowing this suit to be brought in the state court, it is premature. In other words, the plaintiffs may not invoke the jurisdiction of the state court, or proceed at law upon the undertaking, until they are authorized by an order of the federal court to do so.

It was held in this case by this Court (19 Mont. 313, 48 Pac. 305) that the state court has jurisdiction; conceding, for the sake of argument, that the federal court could award or refuse damages in finally disposing of the injunction proceeding. That court made a final disposition of the case by entering a judgment of dismissal, and awarding costs against the plaintiff therein. This was tantamount to a direction to the defendants to go for relief to the tribunal of their choice.

Judgment on the pleadings is proper where the complaint is sufficient, and none of its material allegations are denied, and no affirmative matter alleged to defeat the action. (*City and County of San Francisco v. Staude*, 92 Cal. 560, 28 Pac. 778; *Power v. Gum*, 6 Mont. 5, 9 Pac. 575.)

The district court heard proof to determine the amount of damages. This was not necessary. (Sections 754, 1020, Code of Civil Procedure.)

Let the judgment be affirmed.

Affirmed.

WASHOE COPPER CO., RESPONDENT, v. HICKEY, ET AL.,
APPELLANTS.

[No. 1,465.]

[Submitted October 13, 1899. Decided November 6, 1899.]

*Appeal and Error—Undertaking on Appeal—Jurisdiction—
Record.*

1. A court granted, first, a restraining order, then an order continuing in force the restraining order and directing an injunction *pendente lite* to issue, and afterwards entered another order making the restraining order absolute and directing that the defendants be enjoined until further order; and defendants filed notice of appeal "from the order continuing the restraining order issued therein in force, and from the order granting an injunction against defendants pending the final determination of this action, and from the injunction order granted herein," and the undertaking on appeal, which was in the sum of \$300, recited that, "whereas defendants have taken an appeal from the orders in said cause continuing a restraining order in force, granting a temporary injunction, and from said order of temporary injunction," and the defendants in their brief on appeal assigned the orders as separate errors. Held, that the appeal should be dismissed, as said undertaking was void on account of ambiguity, because it could not be referred to either of the orders from which the appeal was sought, although one of said orders was not appealable. (Following *Creek v. Bozeman Water Works Co.*, 22 Mont. 327; and *Murphy v. Northern Pac. Ry. Co.*, 22 Mont. 577.)
2. The statute providing for appeals must be strictly complied with.
3. The supreme court has no jurisdiction to entertain the appeal, where the appellant fails to file a proper undertaking on appeal.
4. Where a record on appeal contains a certificate of the trial court's clerk, as required by Code of Civil Procedure, section 1739, providing that such clerk shall certify that "an undertaking in due form has been properly filed," an undertaking may be shown to be void for uncertainty by filing a certified copy of the same in the supreme court, where such copy does not tend to contradict the record as to any matter of fact.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

ACTION by Washoe Copper Company against Edward Hickey, Michael A. Hickey, John H. Steward, F. Augustus Heinze and Arthur P. Heinze. There was judgment for plaintiff, and defendants appeal. Appeal dismissed.

Messrs. McHatton & Cotter, Clayberg & Corbett, Mr. Charles R. Leonard and Mr. Robt. B. Smith, for Appellants.

Mr. William Scallon, Mr. J. K. McDonald and Mr. T. J. Walsh, for Respondent.

23	319
23	337
23	565
23	319
24	348
23	319
28	464
26	319
33	5
34	309

23	319
38	422

PER CURIAM.—This action was brought by plaintiff in the district court of Silver Bow county to recover the possession of certain underground workings within the vertical planes of the boundaries of the Oden lode mining claim, and the ore deposits therein, situate in Silver Bow county, and to secure an injunction perpetually restraining the defendants from trespassing thereon, and removing therefrom any of the ore deposits. Upon the filing of the complaint, an order was made by the district judge requiring the defendants to appear before the court on April 22, 1899, to show cause why an injunction *pendente lite* should not issue, and directing them, until the hearing, to refrain from extracting and removing any ore from the workings in controversy. On April 22d a hearing was had. At its conclusion the defendants moved the court to set aside and vacate the restraining order theretofore issued. Thereupon the court overruled this motion, and made an order continuing in force the restraining order, and directing an injunction *pendente lite* to issue when the plaintiff should execute a bond in the sum of \$25,000. On May 27th, the required bond having been given, the court entered another order making the restraining order absolute, and directing that the defendants, their agents and employes, be enjoined, until further order, in accordance with the prayer of the complaint.

Thereupon the defendants served and filed their notice of appeal "from the order * * * continuing the restraining order issued therein in force, and from the order granting an injunction against the defendants pending the final determination of this action, and from the injunction order granted herein." The undertaking on appeal is in the sum of \$300. It contains this recital: "Whereas, the above-named defendants have taken an appeal from the orders of the district court made in the above-entitled action continuing a restraining order in force granting a temporary injunction, and from said order of temporary injunction: Now, therefore, if the above-named defendants and appellants shall pay all damages and costs which may be awarded against them on said appeal, or on the dismissal thereof, not exceeding the sum of \$300, then

this obligation shall be null and void; otherwise, to remain in full force and effect.”

The transcript on appeal was filed in this court on August 30, 1899. On October 2d, upon application of appellants under Subdivision 3 of Rule VII of this Court (44 Pac. vii), the cause was advanced, and set for hearing on the 13th of that month. On October 11th, the respondent, after obtaining an order from this Court shortening the time of notice required by Section 1822, Code of Civil Procedure, filed a motion to dismiss the appeal on the ground that it was taken from two separate orders, whereas but one undertaking on appeal in the sum of \$300 had been filed. The motion was set for hearing on October 13th, when the motion and the case on the merits were submitted together. At the hearing, counsel for appellants argued that the appeal was really taken from the order granting the temporary injunction, and was not designed to include any other order. Therefore the undertaking in the sum of \$300 is sufficient to secure the appeal. But this argument is not sustained by the facts. It is apparent from the foregoing statement of the facts that the intention was to have this Court review the action of the district court in the making of both orders. Also in the brief of appellants, filed in this Court on October 2d, the orders are assigned as separate errors, and treated as such; counsel assuming that, whatever this Court should feel authorized upon the record to do with reference to the order of May 27th, it should, in any event, reverse and annul the order of April 22d.

The simple question presented, therefore, is as to the sufficiency of the undertaking to secure the appeal. We hold that it is not sufficient, in that it does not state which appeal it was intended to secure. This case comes clearly within the rule of *Creek v. Bozeman Water Works Co.*, 22 Mont. 327, 56 Pac. 362, and *Murphy v. Northern Pac. Railway Co.*, 22 Mont. 577, 57 Pac. 278, viz., that the undertaking is void for ambiguity, because it cannot be referred to either of the orders from which an appeal is sought to be taken. And it makes

no difference that either of the orders is not appealable. Under the principle of *Creek v. Bozeman Water Works Co*, *supra*, the Court will not look into the record to determine whether this is so. The statute providing for appeals must be strictly complied with. A failure on the part of the appellant in this regard leaves this court without jurisdiction to entertain the appeal.

The certificate of the clerk of the district court, attached to the transcript, is in conformity with the provisions of the Code of Civil Procedure, Section 1739. In aid of the motion to dismiss, counsel for respondent presented with the motion a certified copy of the undertaking on appeal. Counsel for appellants insist that this court cannot look beyond the certificate of the clerk to determine whether the undertaking is sufficient, citing *Bonds v. Hickman*, 29 Cal. 461, and *In the matter of the Fifteenth Avenue Extension*, 54 Cal. 179. These cases, however, are not in point. They only decide the point that the record in the appellate court cannot be contradicted by affidavits filed in that court as to a matter of fact occurring in the proceedings in the trial court, so as to amend the statements contained in the record, but that such amendment, if made, must be upon application to the trial court. The certified copy of the undertaking presented with the motion does not tend in any way to contradict the record as it stands in this court as to any matter of fact. In order to avoid encumbering the record, the statute (section 1739, *supra*) provides that the clerk must certify that "an undertaking in due form has been properly filed." The copy presented under the certificate of the clerk enables this Court to judge of the correctness of the clerk's conclusion as to the form of undertaking. If this could not be looked to upon a motion to dismiss, then the certificate of the clerk conforming to the statutory direction would be conclusive upon this Court, and no appeal could be dismissed either for the want of an undertaking or because the one filed is insufficient.

The appeal must be dismissed.

Dismissed.

STATE, RESPONDENT, v. SHEPPHARD, APPELLANT.

[No. 1,417.]

[Submitted October 17, 1899. Decided November 6, 1899.]

Criminal Law—Review—Action of Trial Court in Denying a New Trial—Presumption—Appeal for Insufficiency of Evidence—Record—Noncompliance with Supreme Court Rules—Effect—Trial—Opening Statement of Prosecuting Attorney.

1. The trial court is presumed to have acted legally in denying motion for a new trial, and to have based on a proper foundation its decision that the evidence was sufficient to sustain the conviction.
2. An appellant, relying on the insufficiency of the evidence, must show by the record affirmatively all material facts, or the substance thereof, so as to overcome the presumption in favor of the court below.
3. On an appeal for insufficiency of the evidence to convict, the entire evidence which is material, or its substance, should be before the appellate court in the bill of exceptions.
4. On an appeal for insufficiency of the evidence to justify the verdict, the appellate court will not examine the evidence to test its sufficiency, unless the fact that the bill of exceptions contains all the evidence, or the substance thereof, be certified to by the trial judge, or the bill itself clearly shows such to be the fact.
5. The certificate of the stenographer, who transcribed his notes for an appeal, that the transcript contains all the evidence, cannot supply the certificate of the judge to that effect, or an omission of the bill of exceptions itself to show that it does.
6. A failure to comply with Supreme Court Rule V. regulating the form of appellant's brief, will warrant a refusal to consider specifications of error.
7. It is not "misconduct" on the part of the prosecuting attorney to state to the jury in his opening statement that the defendant had made a confession, even though said confession be subsequently held to be inadmissible.

Appeal from District Court, Deer Lodge County; Welling Napton, Judge.

Charles Shepphard was convicted of murder in the second degree, and from the judgment and from an order denying a new trial he appeals. Affirmed.

Messrs. Walsh & James, for Appellant.

Mr. C. B. Nolan, Attorney General, and Mr. J. H. Duffy, for the State.

MR. JUSTICE HUNT delivered the opinion of the Court.

23	323
24	123
24	124
23	328
25	216
23	323
26	481
23	323
28	90
28	129
23	323
30	376
23	323
34	516
23	323
36	176

The defendant, Charles Shepphard, was convicted of murder in the second degree, for the deliberate killing of John Benson, at Deer Lodge county, on or about November 6, 1898. He appeals from the judgment and from an order overruling his motion for a new trial.

The principal error pressed upon our consideration is the alleged insufficiency of the evidence to sustain the verdict. This Court cannot say, though, that the evidence did not justify the verdict and order of the court denying a new trial. There is a presumption obtaining that the district court acted in obedience to the rules of law, and that its decision that there was evidence sufficient to sustain the conviction rested upon a proper foundation. An appellant, relying upon the ground of insufficiency of evidence to justify a verdict, is in duty bound to make up his record so that it will affirmatively show all the material facts, or the substance thereof, upon which he predicates his assignment; that is, the appellant assumes to remove the reasonable inferences or presumptions which favorably accompany the action of the trial court. (*People v. Williams*, 45 Cal. 25.)

It is well established that, where the error relied on is the insufficiency of the evidence to justify the verdict, the entire evidence, or its substance, which is material, should be before the appellate court, to enable it to say whether or not the order denying a new trial was erroneously made. (*People v. Leong Sing*, 77 Cal. 117, 19 Pac. 254.) This being so, it is the duty of an appellant to see to it that his bill of exceptions contains, not only all the material evidence, or the substance thereof, but that that fact is properly certified to by the district judge who certifies to the bill, or that the bill of exceptions itself shows that the evidence therein contained and set forth is *all* the evidence had on the trial material to the illustration of the alleged insufficiency thereof to justify the verdict. Where the judge's certificate is relied on, we think it sufficient if it uses any language by which it clearly appears that the bill contains all the evidence, or so much thereof as is necessary to demonstrate the point relied on, and that there need

be no adherence to any precise words in the certificate of that fact. (*People v. Henchler*, 137 Ill. 580, 27 N. E. 602; *Brock v. State*, 85 Ind. 397; *Grisell v. Noel Bros., Flour-Feed Co.*, 9 Ind. App. 251, 36 N. E. 452; *Jones v. Layman*, 123 Ind. 569, 24 N. E. 363.) Where the bill of exceptions itself is relied on to show the insufficiency of the evidence, it should either set forth in express language that all the evidence, or the substance thereof, or so much thereof as is necessary to illustrate the point relied on, is all incorporated in the bill, or it should contain statements equivalent to such expressions, or it should show a whole connected narrative, so constructed that it clearly appears that all the material evidence, or the substance thereof, is incorporated in the bill.

The practice in this state, though not uniform, in pursuing one of the two methods required, is yet quite consistent in observance of the essentials of whichever mode is selected. For instance, on examination of the transcript, we find that at the conclusion of the testimony in the case of *Hamilton v. Great Falls Street Railway Co.*, 17 Mont. 334, 42 Pac. 860, and 43 Pac. 713, appear the words: "The foregoing was all the evidence in the case,"—a form to be commended; so, in the original record in the case of *State ex rel. Pigott v. Benton*, 13 Mont. 306, 34 Pac. 301, at the close of the testimony and admissions, these words appear: "And this was all the evidence;" and in *Bonner v. Minnier et al.*, 13 Mont. 269, 34 Pac. 30, the transcript discloses that these words were used: "The foregoing was all the testimony and evidence introduced by the parties upon the trial of the cause,"—any one of which forms obviously secures certainty, and enables this Court to determine that all the evidence is in the record. Where the bill of exceptions itself is not certain, an example of a good form of certificate by the judge is found in the case of *State v. Sloan*, 22 Mont. 293, 56 Pac. 364, where Judge Armstrong certified that "the foregoing bill of exceptions is full, true, and correct, and that it contains *all* the evidence introduced and offered * * * on the trial of said cause."

But the record before us is fatally deficient under the

requirements and practice of either method. We find the judge's certificate is as follows: "The above and foregoing bill of exceptions and statement on motion for new trial is this day settled and allowed, in the presence of the respective counsel herein, in open court, this 3d day of April, 1899." It falls short of showing, by positive or inferential language, that the bill of exceptions contains all the evidence, or the substance thereof, and we cannot presume from this certificate that it does, while the bill of exceptions itself fails to recite that all the evidence had on the trial is included therein; nor does it fairly appear from the expressions of the bill of exceptions that no other evidence was introduced than that contained in the bill. (*Hibbard v. Kirby*, 38 Ark. 102.) To illustrate, after the recital of the filing of the information and the arraignment and plea, the bill continues: "That thereafter, to-wit, on the 17th day of January, 1899, this cause came on regularly to be heard, * * * and the following testimony was introduced and proceedings had." Then follows an examination of a juror as to his qualifications, and an exception by the defendant to the ruling of the court excusing the juror. Next comes the recital of a remark made by the county attorney in his opening statement, to which objection was made, which was overruled by the court, and to which ruling defendant excepted. The bill continues: "W. L. Powell, a witness on behalf of the state, after being duly sworn, testified as follows." Then appears the testimony of Dr. Howsley, "a witness on behalf of the state." Next follows the testimony of several other witnesses, and at the end of one appear the words, "State rests." The next thing apparent is a motion by defendant that the court direct a verdict of not guilty upon certain grounds. This was overruled, and an exception noted. Defendant's testimony follows. At the conclusion of the testimony of one of his witnesses, the bill recites, "Defendant rests." Rebuttal testimony then comes, and we find the words, "Testimony closed." And this is all that there is in the bill to show that it contains all the evidence, or the substance thereof, had upon the trial,

except a certificate of the stenographer of the court certifying that "the above and foregoing transcript, pages 1 to 168, both numbers being inclusive, contains a full, true, and correct copy of my notes, in narrative form, taken at the trial of the above-entitled cause, to the best of my ability." But the certificate of the stenographer cannot be considered by this Court to supply the certificate of the judge or the omissions of the bill of exceptions itself. (Code of Civil Procedure, Sec. 377; *People v. Woods*, 43 Cal. 176; *People v. Armstrong*, 44 Cal. 326.) If, after the testimony of the prosecution, there had been a recital that "thereupon" the state rested, and after the last testimony of the defendant incorporated in the bill a recital that "thereupon" the defendant rested, or the formula that "this was all the evidence given in the case" had appeared, or there were sufficient in respect to the judge's certificate to make it reasonably certain that the whole of the evidence material to the point assigned, or the whole of the substance thereof, was in the record, we should examine into it to test its sufficiency. (*Ironwood Store Co. v. Harrison*, 75 Mich. 197, 42 N. W. 808.) But it is not at all clear by this record that there was no other evidence before the jury than that included in the record, and, in the absence of an affirmative showing of a connected narrative or of positive statement that the entire evidence is therein, defendant has failed to avail himself of the point he would rely on.

The appellant assigns a number of other errors in his specification of errors of law occurring at the trial and excepted to by the defendant. But his counsel have entirely ignored Rule V of the rules of this Court (44 Pac. vii), which requires that: "The appellant's brief shall contain, *in the order* here stated: * * * (b) A specification of errors relied upon, which shall be numbered and shall set out separately and particularly each error intended to be urged," etc.

"(c) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the page of the record, and the authorities relied upon in support of each point."

This failure to comply with the rules of the Court warrants us in refusing to discuss the several points pressed by the specifications. (*State v. Allen*, 23 Mont. 118, 57 Pac. 725.)

In their argument upon the insufficiency of the evidence to justify the verdict, counsel refer to the misconduct "of the prosecuting attorney in pressing his case in the manner shown by the record." This "misconduct" seems to have consisted in this: The county attorney, in his opening statement, told the jury that defendant had made a confession. Thereafter certain confessions of the defendant were offered in evidence, and admitted, after the court had heard testimony in relation to the circumstances under which the confessions had been made. After the introduction and admission of such confessions, on motion of the defendant the court withdrew them from the consideration of the jury, upon the ground that it appeared that the defendant had made the admissions while laboring under some inducement and fear of the authority of the officials to whom he made them. But, in our opinion, there was no "misconduct on the part of the prosecuting attorney" in stating to the jury that a confession had been made, or in endeavoring to have the confessions admitted in evidence as part of the state's case; indeed, in our judgment, two of the confessions were admissible, and it was error on the part of the court to have withdrawn them from the consideration of the jury. It is unnecessary to discuss any of the other assignments. They are deemed waived, because not argued.

The judgment and order appealed from are affirmed.

Affirmed.

STATE EX REL. INDEPENDENT PUBLISHING CO. ET AL.
RELATORS, v. SMITH, JUDGE, RESPONDENT.

[No. 1,440.]

[Submitted October 19, 1899. Decided November 6, 1899.]

Mandamus to Compel Change of Venue.

1. Refusal in the district court of a change of venue on the ground of residence is a judicial act, which by Code of Civil Procedure, section 1742, may be reviewed on an appeal from the final judgment; and hence *mandamus* will not lie to compel a judge to grant a change on such ground, the remedy by appeal from the final judgment being plain, speedy, and adequate.
2. *Mandamus* lies to coerce into activity, but not to direct the making of a particular judicial decision or ruling in a matter within the jurisdiction of the court or judge.

APPLICATION for *mandamus* by the state, on the relation of the Independent Publishing Company, a corporation, and others, relators, against D. F. Smith, Judge of the District Court of the Eleventh Judicial District, in and for Flathead County. Respondent demurs to the petition. Demurrer sustained, and application dismissed.

Messrs. Carpenter & Carpenter, Mr. M. Bullard, Mr. T. D. Long, Messrs. Foot & Pomeroy, and Messrs. Cullen, Day & Cullen, for Relators.

Mandamus lies to compel the performance of an act which the law specially enjoins as a duty. (Code of Civil Procedure, Sec. 1961.) The statute makes it the duty of the court upon the filing of a proper affidavit to grant the change. There is no discretion to be exercised. The defendants are entitled as of right to the change. Justice Whitman, speaking of a statute identical with ours, says: "As a general rule, change of place of trial is eminently within the discretion of the court to which the motion is addressed; but when the motion is made under the peculiar language of the statute cited, on the ground of residence, there is no room for discretion. The statute is peremptory in that regard, and the party making such motion

23	329
24	318
24	315
23	329
25	23
25	211
23	329
27	281

is entitled to have the same granted, that he may plead or take such other action as he may be advised; and to that end, it is his privilege to have the ruling and decision of the judge of the place of his residence, upon any question arising subsequently to the necessary order, upon his demand and motion." (*Williams v. Keller*, 6 Nev. 141.) To the same effect is the case of *Watkins v. Degener*, 63 Cal. 500. Both of the above cases were cited with approval in the case of *Yore v. Murphy*, 10 Mont. 304. Speaking of another subdivision of the same statute—that authorizing a change for the disqualification of the judge—Judge Beatty says: "The plain injunction of the statute leaves the disqualified judge, in such cases, no discretion. He has but one thing to do, and it is his duty to do that thing at once." (*Krumdick v. Crump* (Cal.), 32 Pac. 800.) So, too, this court has held, in the matter of a motion for a change of venue in actions commenced before a justice of the peace, that the filing of the affidavits containing the required statements ousts the justice of his jurisdiction for further proceedings except to transfer the cause. (*State v. Evans*, 13 Mont. 239.) To the same effect is the decision of the Supreme Courts of Washington and Colorado. (*State ex rel. Cummings v. Superior Court*, 32 Pac. 457; *Smith v. People*, 29 Pac. 924; see, also, 4 Amer. & Eng. Ency. Prac. 440.) It follows from these that the writ must be granted unless there is "a plain, speedy and adequate remedy in the ordinary course of law."

Prior to the adoption of the Codes there was an appeal from "an order refusing to change the place of trial." By their adoption that right has been taken away, and the action of the court in denying the motion cannot be reviewed on appeal until after final judgment. We submit that the remedy is neither speedy nor adequate. This court has held that an appeal to the district court from a judgment by a justice of the peace affords no relief against his order refusing to change the place of trial in a proper case, and that *certiorari* to review his action would therefore lie. (*State v. Evans, supra.*) We submit that the same is true in this case. "The appeal," as

Judge Harwood says, "would rather involve a submission to such action, as though it was fully within the justice's (court's) jurisdiction." See, also, *Krumdick v. Crump*, *supra*, where *mandamus* was granted. Where the remedy by appeal is inadequate *mandamus* will lie. (*Carragea v. Fernald*, 66 Cal. 351; Merrill on *Mandamus*, Sec. 53.)

Mr. T. J. Walsh, for Respondent.

PER CURIAM.—This is an application for a peremptory writ of mandate to compel the judge of the district court of the county of Flathead to cause to be entered an order changing the place of trial in a certain action commenced and pending in that court, wherein one Whiteside is the plaintiff and the relators are the defendants, to the county of Lewis and Clarke. An alternative writ was issued, the verified petition in support of which shows these facts: The action was brought to recover damages for alleged libels published by the defendants in the county of Flathead; all the defendants were served with summons in the county of Lewis and Clarke, where they reside; at the time the defendants appeared and demurred, they made and filed a demand for a change of venue to the county of their residence, and accompanied the demand with an affidavit of merits, which demand was denied. To the petition the respondent demurs for insufficiency, asserting that *mandamus* is not the proper remedy, and also that, even if the remedy sought be proper, the order of the district court refusing the request to change the place of trial was correct. The relators, on the other hand, contend that the provisions of Sections 613, 614, 615, of the Code of Civil Procedure, made it the ministerial duty of the court, upon the filing of the demand and affidavit of merits, to grant the change, and that the performance of such act by the district court of which the respondent is the judge is a duty specially enjoined by statute, to compel the discharge whereof there is no plain, speedy and adequate remedy in the ordinary course of law, and that therefore *mandamus* is the remedy.

Granting or refusing to grant a change of venue upon the

ground of residence is a judicial act, when done by a district court of this state. On appeal to this Court from the final judgment of the district court, an order denying a change of venue demanded by the appellant may be reviewed (Section 1742 of the Code of Civil Procedure); hence we are clearly of the opinion that *mandamus* is not, under the statutes of Montana, the proper remedy to compel a court of general common-law jurisdiction, or its judge, to grant a change of the place of trial of an action for libel to the county where the defendant resides and was served with summons, nor to correct or annul an erroneous order denying such change. The writ lies to coerce into activity, but not to direct the making of a particular judicial decision or ruling in a matter within the jurisdiction of the court or judge. If final judgment shall be entered against the defendants in the action brought by Whiteside, an appeal therefrom is a plain, speedy and adequate remedy afforded them in the ordinary course of law for the review and correction of the supposed error committed in refusing to change the venue. If the writ be proper on the present application, then it might well be invoked to review any intermediate order or decision of a court or judge, such as an order overruling a demurrer to a complaint, or striking out irrelevant matter from a pleading, or granting or refusing a motion to quash a summons, or granting or denying a continuance. *Mandamus* may not thus be diverted from its legitimate office. From a multitude of cases supporting the conclusion here announced, we cite *People v. Sexton*, 24 Cal. 78; *People v. McRoberts*, 100 Ill. 458; *State v. Cotton*, 33 Neb. 561, 50 N. W. 688; *People v. Hubbard*, 22 Cal. 35; *People v. Judge of Twelfth Dist.*, 17 Cal. 548; *People v. Clerk of Court*, 22 Colo. 280, 44 Pac. 506; *Ex parte Chambers*, 10 Mo. App. 240; *State v. Clayton*, 34 Mo. App. page 569. See, also, High, Extr. Leg. Rem. (4th Ed.) Sec. 172, and 4 Enc. Pl. and Prac. 442, 443 and 492.

The relators invite attention to *State ex rel. Gleim v. Evans* 13 Mont. 239, 33 Pac. 1010. That was a proceeding in *certiorari*, in which it was held that, when an application was

made to a justice of the peace for a change of venue on the ground of the prejudice of the justice, any proceeding by the justice thereafter, except to transfer the cause to another justice, would be beyond his jurisdiction, and that any judgment subsequently rendered the justice on whom demand for a change was made should be annulled upon *certiorari*. *Herbert v. Beathard*, 26 Kan. 746, is a case of the same kind. The statute of Kansas provides, in substance, that if, prior to trial, either party shall file with the justice of the peace before whom a case is pending an affidavit stating that he believes he cannot have a fair and impartial trial, on account of the bias or prejudice of the justice against the affiant, the trial of the case shall be changed to another justice of the peace; and the court held that upon the filing of such an affidavit the justice of the peace does not exercise any judicial discretion in determining whether he will grant the change of venue or not, but that the granting of the change of venue is, under such circumstances, a purely ministerial act. So, in *Krumdick, v. Crump, Judge*, 98 Cal. 117, 32 Pac. 800, the court held that *mandamus* would lie to compel a judge who, having been the attorney for the defendant in the action, was confessedly disqualified to grant a change of venue, the court saying that the statute left the disqualified judge no discretion to exercise; moreover, if he had tried and determined the cause, the judgment would doubtless have been void because *coram non judice*, since no man may adjudge his own case. It was held that his duty was specially enjoined by the statute, and was ministerial. In *State v. Superior Court of King Co.*, 5 Wash. 518, 32 Pac. 457, a writ of prohibition was issued to the superior court to prevent it from trying a certain action, wherein the defendant had made due application for a change of venue to the county of his residence; and the decision proceeds upon the assumption or premise that, after the demand for a change of venue was made, the court had no jurisdiction of the action for the purposes of trial. No one of the cases relied upon by the relators is persuasive authority for their position.

The demurrer is sustained, and the application dismissed, for the reason that *mandamus* is not the proper remedy. Judgment will be entered accordingly.

Dismissed.

HARDING, APPELLANT, v. McLAUGHLIN, SHERIFF,
ET AL., RESPONDENTS.

[No. 1,172½.]

[Submitted October 25, 1899. Decided November 13, 1899.]

Appeal — "Statement on Appeal" — Bill of Exceptions — Refusal of Trial Judge to Settle or Allow Bill of Exceptions — Application to Supreme Court to Prove Exceptions — Certification — Nonsuit.

1. Since July 1, 1895, the Statutes of Montana no longer recognize a "Statement on Appeal."
2. Under Code of Civil Procedure, Section 1157, and Supreme Court Rule IV, Subdivision 14, allowing a bill of exceptions to be proved before a referee, by leave of the Supreme Court, when the trial judge refuses to settle it in accordance with the facts, and requiring the bill, when proved, to be certified by the chief justice as correct, etc., a bill proved before a referee on leave granted, but not certified to as correct, will be disregarded.
3. Under Code of Civil Procedure, Section 1157, and Supreme Court Rule IV, Subdivision 14, allowing a bill of exceptions to be proved before a referee, by leave of the Supreme Court, when the trial judge refuses to settle it, a bill proved before a referee will be disregarded when his report fails to show that the judge's refusal to settle it because of delay in serving it was not justified.
4. The remedy given by Code of Civil Procedure, Section 1157, and Supreme Court Rule IV, Subdivision 14, allowing a bill of exceptions to be proved before a referee, by leave of the Supreme Court, when the trial judge refuses to settle it in accordance with the facts, does not apply to a mere refusal of the judge to settle any bill whatsoever.
5. Error in granting a nonsuit cannot be considered when there is no bill of exceptions.

Appeal from District Court, Missoula County; Frank H. Woody, Judge.

ACTION by Edward Harding against H. W. McLaughlin, as sheriff, and another. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Mr. W. M. Bickford and Mr. E. E. Hershey, for Appellant.

Mr. Jos. M. Dixon, for Respondents.

MR. JUSTICE PIGOTT delivered the opinion of the Court.

This is an appeal by the plaintiff from a judgment of non-suit entered in 1897 in an action to recover the possession of personal property alleged to have been wrongfully taken and withheld by the defendants.

The transcript contains what is styled "a Statement on Appeal." Since the 1st day of July, 1895, when the Code of Civil Procedure went into effect, the statutes of Montana no longer provide for or recognize a "statement on appeal" as a means whereby matters not part of the record proper may become parcel of the judgment roll; but, conceding that the mere name by which the paper is labeled is unimportant, and that it was intended as a bill of exceptions, we are nevertheless constrained to disregard it, for the reason that it is not authenticated. The judge who tried the cause refused to settle, allow, or sign the proposed bill; an application designed to be in conformity with section 1157 of the Code of Civil Procedure, and subdivision 14 of Rule IV. of the rules of this Court (44 Pac. vi.), then in force, was made to, and granted by, the justices of this court, for leave to prove that the judge below had refused to allow the exceptions of the plaintiff in accordance with the facts; a referee took evidence on the matter, and reported findings, which were filed in the office of the clerk of the court below, and also with the clerk of this court,—after which the plaintiff proceeded no further towards securing a settlement. The requirements of section 1157, *supra*, that the bill, when proved, must be certified by the chief justice as correct, and filed with the clerk of the court in which the action was tried, were not complied with in any respect. Certification by the chief justice (or in his absence by the senior associate justice), and the subsequent filing with the clerk of the trial court, are essential to the making of the bill, for section 1157 further provides that, when so certified and filed, "it has the same force and effect as if settled by the judge who tried the cause." Moreover, had the proposed bill been so certified by the chief justice and

filed, its contents could not properly be examined, for the reason that the judge *a quo* refused to settle or allow it upon the ground (among others) that it was not served on the defendants within the time prescribed by section 1155 of the Code of Civil Procedure, and, for aught that appears to the contrary, the refusal was justified. The action was tried with a jury on the 22d day of April, 1897, and judgment was formally entered on the 9th day of the following June; the proposed bill of exceptions, designated as a "Statement on Appeal," was served upon the defendants on the 10th day of July, 1897. To preserve by bill the exceptions taken at a trial had with a jury, a draft of the bill must be served within 10 days, or such further time as may be allowed, after the entry of judgment. In this case more than 10 days elapsed between the entry of judgment and the service, and there is absolutely nothing in the report of the referee or elsewhere to show that the action of the judge in declining to settle the bill was not correct. If there was any enlargement of the time by stipulation of parties or otherwise, or a waiver on the part of the defendants of the right to object to the settlement because not duly served, the plaintiff, confronted as he was with the refusal of the judge, should have shown such fact. Again, the supposed bill must be disregarded for another reason: The rule declared in *In re Plume*, ante, 23 Mont 44, 57 Pac. 408, is in point upon this question, for it was there held that the remedy given by section 1157 and the rule of this Court does not apply to a mere refusal of the judge to settle any bill whatsoever, and it may be remarked in passing that this is all that was decided in that case, the determination of the question as to what is the proper remedy being unnecessary to a decision.

All the proceedings on the trial being eliminated, we have nothing before us except the pleadings, the order granting the motion for a nonsuit, and the judgment; the only error specified is the granting of the motion for a nonsuit, and this cannot be considered without reference to the evidence which was before the district court. The judgment is therefore affirmed.

Affirmed.

GRAGE, APPELLANT, v. PAULSON, DEFENDANT, UNITED
SMELTING AND REFINING COMPANY,
GARNISHEE AND RESPONDENT.

23	337
24	236

23	337
38	422

[No. 1,438.]

[Decided November 27, 1899.]

Appeal—Undertaking on Appeal—Ambiguity—Dismissal of Appeal.

A single undertaking in the sum of \$300 to secure two appeals from two separate orders made at different times after judgment is void for ambiguity, justifying a dismissal of both appeals.

Appeal from District Court, Lewis and Clarke County;
S. H. McIntire, Judge.

ACTION by Henry Grage against Tony Paulson, defendant, and the United Smelting & Refining Company, garnishee. On motion to dismiss appeals. Sustained.

Mr. J. M. Clements and *Mr. Chas. J. Geier*, for Appellant.

Messrs. Toole, Bach & Toole, for Respondent.

PER CURIAM. It appears from the record herein that two appeals have been taken from two separate orders made after judgment,—one entered on April 15, and one on June 10, 1899. It further appears that only one undertaking, in the sum of \$300, is on file with the clerk of the district court to secure both appeals. A motion is made to dismiss the appeals on the ground that the undertaking is void for ambiguity. The motion must be sustained, upon the authority of *Creek v. Bozeman Waterworks Co.*, 22 Mont. 327, 56 Pac. 362; *Murphy v. Northern Pacific Railway Co.*, 22 Mont. 577, 57 Pac. 278; *Washoe Copper Co. v. Hickey*, 23 Mont. 319, 58 Pac. 866.

Let the appeals be dismissed.

Dismissed.

COBBAN, RESPONDENT, v. HINDS, TREASURER OF SILVER
BOW COUNTY, ET AL., APPELLANTS.

[No. 1,450.]

[Submitted October 5, 1899. Decided November 27, 1899.]

Taxation—Assessment—Sale for Nonpayment—Injunction.

1. An assessment is not void because made upon several parcels of land in gross, and equity will not enjoin the sale of separate lots, assessed in gross, for the collection of taxes thereon, where complainant does not show that he attempted to have the irregularity, of which he now complains, corrected by application to the board of equalization, and offers no excuse for not doing so. (*Deloughrey v. Hines*, 23 Mont. 280, affirmed).
2. Under Political Code, Sections 4023-4026, which prohibit courts and judges from restraining the sale of property for nonpayment of any tax, except where the tax is illegal or not authorized by law, or where the property is exempt from taxation, the listing of lands to the wrong person is no ground for restraining the tax sale; since under Political Code, Sections 3700, 3916, 4014, it is but an irregularity or informality, which, of itself, does not avoid the assessment nor render the tax "illegal or unauthorized."
3. An owner of land is, in law, bound to know: that his property is liable to taxation, and would be assessed annually; that a listing to one other than the owner would not avoid an assessment otherwise regular; when the taxes would fall due and should be paid, hence he cannot successfully urge, as a reason why his lands should be relieved of the lien for taxes, that he did not know of the assessment, and had no opportunity to discharge the taxes.
4. The fact that the notice under which a tax sale was threatened was published but three weeks, whereas the statute required four weeks, does not render the taxes "illegal or unauthorized by law," within Political Code, Sections 4023-4026, so as to authorize the enjoining of the collection of such tax.
5. The fact that a county treasurer intends to violate Political Code, Sections 3922, 3923, by exposing for sale for the delinquent taxes for 1898 part of the lands purchased by the county at the tax sales of 1897, and yet unredeemed, does not entitle the owner of the equity of redemption to an injunction; since Section 4026 provides that the remedy before the board of equalization shall supersede the remedy of injunction and all other remedies which might be invoked to prevent a collection of taxes alleged to be irregularly levied or demanded, except in unusual cases, where the remedy thereby provided is deemed by the court to be inadequate.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

ACTION by W. F. Cobban against Thomas R. Hinds, treasurer of Silver Bow county, and said county. From a judgment entered on sustaining a demurrer to the complaint, defendants appeal. Reversed.

STATEMENT OF THE CASE.

The plaintiff is the owner of an undivided interest in certain real estate situate in the county of Silver Bow. The defendant treasurer being about to sell said real estate for the amount of the taxes due thereon and delinquent for the years 1890, 1892, 1893, 1894, 1895, 1896, and 1898, the plaintiff brought this action to enjoin him from selling, or offering for sale, the property, or any part thereof, for delinquent taxes for those years. The complaint charges, in substance, that the assessment of the property for 1890 is void because the tracts of land and city lots were not separately assessed or valued, but were assessed in gross, together with other lots and parcels of land, of which neither the plaintiff nor his predecessor in interest was the owner; that for each year, beginning with 1890 and ending with 1898, the real estate was assessed to persons other than the true owners, and that neither the plaintiff nor his predecessor in interest had notice of or opportunity to contest the assessment, or notice to pay the taxes; that in 1892 the treasurer of the county sold all of the property to the county of Silver Bow in satisfaction of the taxes delinquent for the year 1891, and that in 1898 the defendant treasurer sold a portion of the property to the county of Silver Bow for the delinquent taxes of the year 1897, and that the property has never been redeemed from either sale; that at the time of the assessment of 1890 the statutes of Montana provided that notice of the sale by the treasurer for delinquent taxes should be published once a week for four weeks the first of which publications should be at least four weeks before the day appointed for the sale, whereas the notice under which the treasurer now threatens to sell the property is but a three weeks' notice. A demurrer for insufficiency was overruled, and, the defendants refusing to plead further, a judgment was entered, in accordance with the prayer of the complaint, perpetually enjoining the defendant treasurer from selling, or attempting to sell, or from offering for sale, the property, or any part thereof, for the taxes de-

linquent for any of the years mentioned. The defendants appeal from the judgment.

Mr. C. B. Nolan, Attorney General, *Mr. C. P. Connolly* and *Mr. R. L. Clinton*, for Appellants.

Citing: *Casey v. Wright*, 14 Mont. 316; *Ward v. Co. Commissioners*, 12 Mont. 32; *German Nat'l Bank v. Kimball*, 103 U. S. 732; *N. P. R. R. Co. v. Patterson*, 10 Mont. 103; *Fifield v. Marinette Co.*, 62 Wis. 532; *First Nat'l Bank v. Bailey*, 15 Mont. 308; Political Code secs. 4023, 4014, 4024, 4025; Constitution Art. XII., sec. 6; *N. P. R. R. Co. v. Carland*, 5 Mont. 153.

Mr. J. K. McDonald, *Mr. C. D. Tillinghast*, *Mr. Robt. McBride* and *Mr. F. T. McBride*, for Respondent.

Plaintiff had no notice of any of the alleged assessments complained of and no opportunity to be heard relative thereto.

The Statutory and Code provisions of Montana under which the alleged assessments complained of were made, are as follows: Sec. 1684, Fifth Division, Comp. Statutes 1887; Sec. 13, Laws of Mont., Ex. Sess. 1887; Secs. 19, 20, Sec. Session, 1891; Secs. 3706, 3707, Political Code, 1895; Sec. 3725, Political Code, 1895.

Montana has adopted almost without change the California law relative to the levy of taxes; the corresponding sections of the California Code relative to the assessment of real property being 3635 to 3638, inclusive, Political Code of California.

A statute of a foreign state which has been adopted by the legislature of this state without provision respecting its interpretation is to be interpreted and construed according to the construction it has received in the courts of the state where it was enacted, and the intention of the legislature to adopt such construction is implied. (*Lindley v. Davis*, 6 Mont. 463; *First Nat. Bank v. Bell S. & C. M. Co.*, 8 Mont. 32; *Price v. Lush*, 10 Mont. 61; *Murray v. Heinze*, 17

Mont. 353; *Largey v. Chapman*, 18 Mont. 567; *Oleson v. Wilson*, 20 Mont. 552.)

The California courts have frequently passed upon these provisions of the Code. In *Grotefend v. Ultz* the court says, "The first duty of the assessor under these provisions is to ascertain the name of the owners of each piece of property and assess it to *him*; his second, if he fails to ascertain the name of the owner, is to assess it to 'unknown owners'"; an assessment otherwise made is void. (*Grotefend v. Ultz*, 53 Cal. 666; *Kelsey v. Abbott*, 13 Cal. 609; *Smith v. Davis*, 30 Cal. 537; *Blatner v. Davis*, 32 Cal. 628; *Hearst v. Egglestone*, 55 Cal. 365; *Bosworth v. Webster*, 64 Cal. 1; *Weyss v. Crawford*, 85 Cal. 199; *Shipman v. Forbis*, 97 Cal. 574; *Gwin v. Dierssen*, 36 Pac. 103; Black on Tax Titles, Sec. 105; *Whitney v. Thomas*, 23 N. Y. 281-285; *Bird v. Ben-lisa*, 142 U. S. 644; 12 S. C. Rep. 323; *Powers v. Larrabee*, 49 N. W. 727; Cooley on Taxation, pages 363, 364; Justice Field, in *County of San Mateo v. S. P. R. R. Co.*, 13 Fed. 752; Cooley on Taxation, pages 365, 366; *Stuart v. Palmer*, 74 N. Y. 183.)

Provisions of the law for giving notice are mandatory and must be scrupulously observed. (Cooley on Taxation, 2nd Edition, page 287; *Overing v. Fouts*, 65 N. Y. 263, 269; *Stuart v. Palmer*, 74 id. 183; *Thomas v. Gaine*, 35 Mich. 155, 164; *The State v. Jersey City*, 24 N. J. L. 4 Zab. 662, 666; *The State v. Newark*, 31 Id. 360, 363; *The State v. Trenton*, 36 Id. 499, 504; *The State v. Elizabeth*, 37 Id. 357; *The State v. Plainfield*, 38 Id. 97; *County of San Mateo v. Southern Pacific R. R. Co.*, 13 Fed. 752; *County of Santa Clara v. Southern Pacific R. R. Co.*, 18 Fed. 385.)

To the effect that notice is jurisdictional, plaintiff cites, in addition to the authorities above presented, the cases decided by Judge Knowles in the circuit court, district of Montana. (*Powder River Cattle Company v. Board of Com., Custer County*, 45 Fed. Rep. 323; and *Western Ranches v. Custer County*, 89 Fed. Rep. 580.)

"This right to a hearing is fundamental and indestructible.

Without it taxation is confiscation. The amount of tax demanded of the citizen is an arbitrary exaction if he has had no legal right to be heard. It is true that the hearing, to constitute due process of law, need not be the same in tax proceedings as in ordinary proceedings in courts of justice. Such a rule would cause intolerable delays. It cannot be doubted that our law providing for a hearing before the boards of equalization, and designating the time when such a hearing may be had, if desired, by the tax payer, is not vulnerable to the constitutional objection that the property of the citizen is taken without 'due process of law.' " (*Hager v. Reclamation Dist.* 111 U. S. 701, 4 Sup. Ct. Rep. 663; *Davidson v. New Orleans*, 96 U. S. 97; *Trustees v. City of Davenport*, (Iowa) 22 N. W. Rep. 904; *Kelly v. City of Pittsburg*, 104 U. S. 78; *Lent v. Tillson*, 72 Cal. 404, 14 Pac. Rep. 71; *Railroad Company v. Commonwealth*, 115 U. S. 321, 6 Sup. Court Rep. 57; *State v. Tax Cases*, 92 U. S. 575-610.) "But it is equally well settled, and it stands upon adamant, that there shall be a hearing of some kind before some person or body." (*Powers v. Larabee*, 49 N. W. 727, and cases cited.)

It is admitted that for the year 1890 the property was not separately assessed, was not assessed to the owner or to unknown owners (*City of St. Louis, Mo., v. Wenneker*, 47 S. W. 105), and that at the time of the alleged assessment that upon a sale of property for delinquent taxes a notice of four weeks must be given and that the notice under which it is proposed to sell the property for said year is for three weeks only. The argument relative to notice applies to this year with especial force. A notice for a shorter period than prescribed by law is wholly illegal.

An assessment in bulk of all the town lots in an addition to a stranger to the title of one-half of all the lots assessed and an effort to sell all of said lots in bulk under such an alleged assessment is certainly something more than a mere "informality." One of the requirements of law which is especially designed for the protection of tax payers, which is imperative, and which is practically universal, is that each separate

and distinct parcel of land shall be separately assessed and valued, hence the assessment of a joint tax on two parcels of land belonging to different owners based on a joint valuation thereof creates no lien for the whole or any part of the tax. (Black on Tax Titles, Sec. 102.)

In case property assessed for taxes is purchased by the county, it must not be exposed for sale until the period of redemption has expired. (Sec. 3922, Political Code.) The sale of the property and the deed executed to the purchaser would result in a cloud upon the plaintiff's title. The deed, by Section 3897, Political Code, is made *prima facie* evidence of its validity.

"If the proceedings in the assessment and levy of a tax upon land are not void upon their face, the tax will attach as a lien upon the land from the time fixed by the statute. And this tax lien, if it is illegal, but not patently so, will constitute a cloud upon the owner's title, even before it is foreclosed by sale of the property. And even in jurisdictions where the tax is not made a specific lien upon land, the advertisement of the land, as intended to be sold for taxes, is a threat of the creation of an adverse claim, which, when brought into being, will be a cloud on the title. Now equity has power to avert, as well as to remove, such a cloud. On both these grounds, therefore, equity may interfere, upon proper grounds being shown, not only after the sale to cancel the certificate or deed, but before any sale, to declare the assessment void and restrain the collection of the tax." (Black on Tax Titles, Sec. 216; *Milwaukee Iron Co. v. Hubbard*, 29 Wis. 51; *McPike v. Pen*, 51 Mo. 63; *Peach v. Hayes*, 58 How. Prac. 17; *Pixley v. Huggins*, 15 Cal. 132; *Hogan v. Shirdler*, 29 Cal. 55; *Thomas v. Simons*, 103 Ind. 538, S. C. 2, N. E. 203, and 3 N. E. 381; Cooley on Taxation, page 780.)

Where the assessment complained of is illegal and void an injunction is the proper remedy, and no tender need be made. (*Bank v. Maher*, 9 Fed. 884; *Yocum v. First Nat. Bank*, 38 N. E. 600; *City of Delphi v. Bowen*, 61 Ind. 33; *Hobbs v. Tiplon Co.*, 3 N. E. 263; *Northern Pacific R. R. Co. v. Galvin*, 85 Fed. 811; *Powers v. Larrabee*, 49 N. W. 727.)

The remedy by injunction against an illegal and void sale is the proper one. (*Yocum v. First National Bank*, 38 N. E. 600; *rehearing denied*, 45 N. E. 15; *Cooley on Taxation*, page 751; *Black on Tax Titles*, 217; *Woodruff v. Perry*, 103 Cal. 611.)

And the statute and its remedies for errors and irregularities has no application. (*Ogden City v. Armstrong*, 18 Sup. Ct. Rep. 98-104.)

The Code of Washington provides for the assessment of land to the owner or occupant, if known, and if not known, the land may be so assessed without stating the name of any owner.

Under such law the supreme court of Washington, in *Baer v. Choir*, 32 Pac. 776, holds that the assessment of land not occupied in the name of a person not the owner was unauthorized and void. (*Baer v. Choir*, 7 Wash. 631, S. C. 32 Pac. 776; see also, *Northern Pac. R. R. Co. v. Galvin*, 85 Fed. 811-814; *Green Mountain S. R. Co. v. Savage*, 15 Mont. 189.)

In the case at bar, plaintiff denies the jurisdiction of the assessor, and alleges that he had *no notice* or opportunity to be heard.

In all cases, without exception, passed upon by our Supreme Court, the party complaining and seeking an injunction had notice and an opportunity to be heard as to the validity and justice of the assessments. (*N. P. R. R. Co. v. Patterson*, 10 Mont. 104-106; *Ward v. Commissioners*, 12 Mont. 23; *Casey v. Wright*, 14 Mont. 315; *State ex rel. Beall v. Ellis*, 15 Mont. 225; *Nat. Bank v. Bailey*, 15 Mont. 301; *rehearing same case*, 16 Mont. 135.)

In the case of *Bank v. Bailey*, 15 Mont. 301, the bank raised the point that it had no notice of the assessment, although it was apparently made in its name and it had furnished the list of property to the assessor to enable him to assess the stockholders. The Court did not say "notice is not required by law;" on the contrary, it acquiesced in the proposition that if no notice had been given the injunction should

issue, and decided that the bank, by alleging it had furnished the list, had shown that it had notice, and that any error or illegality in the assessment was of such a nature as the bank could have had corrected by the board of equalization, 15 Mont. p. 308. The Court cites *Stanley v. Supervisors*, 121 U. S. 550, to the effect that "when the assessing officer has jurisdiction then before a citizen can apply to the court for injunction, he must have first applied to board of revision." The opinion in that case was delivered by Justice Field—there was no question as to notice. Per contra, if the assessing officer never acquired jurisdiction, the citizen would be entitled to injunction without having first made such application. In the rehearing had in *Bank v. Bailey*, reported in 16 Mont. 135, the question was raised that the board had raised the assessment without notice. The Court assumes that if such act had been done that injunction would lie, but find as a matter of fact there had been no increase in the assessment.

The statute provision, held by the courts to impart notice of the making of the original assessment, is that the real estate shall be assessed in the name of the owner when known and to unknown owners when the owner is unknown. Where the assessment is to be increased, notice is to be given by board. (Section 3780, Political Code.)

Failure to give notice provided by statute in either case, would leave the assessor in the one case and the board of equalization in the other, without jurisdiction.

The position taken by defendants that under no circumstances can a sale of property for illegal taxes be enjoined unless the plaintiff first tender the amount which he considers a proper tax upon his property, is not reasonable.

With such a view of the law, it is wholly immaterial whether an assessment of any kind be made or attempted—it is a matter of no importance whether a board of equalization has been organized, met, or an opportunity been given for a hearing as to the valuation, or any irregularity, or any illegality in the proceedings looking toward the collection of the tax. It is a matter of unnecessary labor and expense for the

assessor to list the property in separate and distinct parcels, or to assess it to its respective owners; all that is necessary is for the treasurer to fix upon an amount which will probably be sufficient to meet the running expenses of the county and advertise all or any part of the property in his county for sale in such lots as may suit his fancy, or the fancy of his prospective purchasers, and if the tax payer is not satisfied with this arrangement, all that he is required to do is to approximate what tax his particular lot should bear, and tender such an amount to the treasurer, and then litigate the question whether his approximation was or was not sufficiently accurate to save his property from sale. All the safeguards which the Constitution provides for the preservation of property rights may be ignored, and the citizen is without remedy.

Such, certainly, is not the law in Montana or elsewhere. Defendants suggest that the rules which obtain in other states of the Union prohibiting the taking of private property for public purposes without due process of law, are without force or effect in this state—that in Montana, of all the states of the Union, the right to a hearing before judgment is dependent upon something else besides citizenship—that if any charge of any kind or by any proceeding has been made against the property of a citizen and has been by the powers that be designated a tax, whether such charge be illegal or not, the owner is an outlaw in the courts of the state and is deprived of the rights guaranteed to the humblest citizen unless he confess judgment for the amount of an assessment never made or pay the amount of a tax never levied.

The right of the state to impose upon all property its just proportion of the expenses of government is not questioned, but such right does not justify confiscation—the property of the citizen can only be taken by due process of law, and in every case due process of law requires notice and an opportunity to be heard.

BRIEF OF APPELLANTS IN REPLY.

Cited: Sec. 154, page 119, Session Laws 1891, and Sec. 3926, Political Code, 1895; *Bucknall v. Story*, 36 Cal. 70;

Hannah Winkle v. Georgetown, 15 Wall. 548; *Perrington v. People*, 79 Ill. 13; *De Witt v. Hayes*, 2 Cal. 469; *Burr v. Hunt*, 18 Cal. 307; *Robinson v. Gaar*, 6 Cal. 275; *Berri v. Patch*, 13 Cal. 299, 300; *Weber v. City of San Francisco*, 1 Cal. 455; *Hardenburg v. Kidd*, 10 Cal. 403; *Cooley on Taxation*, page 779; *Sanders v. Yonkers*, 63 N. Y. 489; *Temple Grove Seminary v. Cramer*, 98 N. Y. 121; *Messerole v. Brooklyn*, 8 Paige 198; *Wiggin v. N. Y.*, 9 Paige 16; *Van Doren v. N. Y.*, 9 Paige 388; *Livingston v. Hollenback*, 4 Barb. 9, 16; *Van Rensselaer v. Kidd*, 4 Barb. 17; *Bouton v. Brooklyn*, 15 Barb. 375; *Cox v. Clift*, 2 N. Y. 118; *Scott v. Onderdonk*, 14 N. Y. 9; *Hatch v. Buffalo*, 38 N. Y. 276; *Newall v. Wheeler*, 48 N. Y. 486; *Dean v. Madison*, 9 Wis. 402; *Head v. James*, 13 Wis. 641; *Shepardson v. Sup. of Milwaukee*, 28 Wis. 593; *M. I. Co. v. Hubbard*, 29 Wis. 51; *Floyd v. Gilbreath*, 27 Ark. 675; *Mobile, etc. v. Peebles*, 47 Ala. 317; *Robinson v. Garr*, 6 Cal. 273; *Bucknall v. Story*, 36 Cal. 67; *Ewing v. St. Louis*, 5 Wall. 413; *Hannewinkle v. Georgetown*, 15 Wall. 547; *Crane v. Randolph*, 30 Ark. 579; *Detroit v. Martin*, 34 Mich. 170; *Curtis v. East Saginaw*, 35 Mich. 508; *Briggs v. Johnson*, 71 Me. 235; *Harkness v. B. of P. W.*, 1 MacA. 121; *Eastman v. Thayer*, 60 N. H. 408; *Busbee v. Lewis*, 85 N. C. 332; Sec. 3700, Political Code, 1895; *Lake Co. v. Sierre B. O. M. Co.*, 66 Cal. 19; *Welty on Assessments*, page 143; *Landreyan v. Pepin*, 86 Cal. 124; Sec. 3916 of the Political Code of 1895; Sec. 1736, P. 1133, Comp. Statutes, 1887; Sec. 46, P. 99, Ex. 15 Leg. Sess. 1887; Sec. 148, P. 118, Sess. Laws, 1891; Sec. 3906, Political Code, 1895; Sec. 3780, Political Code, 1895; Sec. 22, Laws Extra Session, 1887; *State R. R. Tax Case*, 92 U. S. 604; *Railroad Tax Case*, 8 Sawyer, 274; *Desty on Taxation*, Vol. I., P. 600, 615; *Meyer v. Rosenblatt*, 74 Mo. 496; *Munson v. Miller*, 66 Ill. p. 383; Sec. 240, page 128, Laws of 1891; Sec. 197, page 127, Laws of 1891.

MR. JUSTICE PIGOTT, after stating the case, delivered the opinion of the court.

1. The contention of the plaintiff, to the effect that the assessment for 1890 was void because made upon several parcels of land in gross, and without separate valuation, has been considered in the late case of *Deloughrey v. Hinds*, 23 Mont. 260, 58 Pac. 709, and held untenable. The facts pleaded in the case at bar are not to be distinguished, upon principle, from those presented in the *Deloughrey* case, the doctrines whereof we affirm and again apply. The plaintiff, and those under whom he claims, were conclusively charged with knowledge of the time and place, appointed by law, when and where the board of equalization would meet; they knew that the lands owned by them would be assessed for the year 1890; and no excuse is offered for their omission to seek at the hands of the board a correction of the informality or irregularity of which they now complain.

2. The plaintiff insists that the assessments are void because the lands were listed by the assessor to persons other than the owners. The several statutes in force when the respective assessments were made furnish a complete answer to the contention. In 1890, Section 46 of "An act to provide for the levy of taxes and assessment of property," approved September 14, 1887, was in effect. It provided: "When any lands or town lots are offered for sale for any taxes, it shall not be necessary to sell the same as the property of any person or persons; and no sale of any land or town lot for taxes shall be invalid on account of its having been charged on the assessment roll in any other name than that of the rightful owner or charged as unknown; but such land must in other respects be sufficiently described on the tax roll to identify it, and the taxes for which it is sold be due and unpaid at the time of such sale." In 1891 there was passed "An act concerning revenue," approved March 6th of that year. Section 13 of this act, after providing that the assessor must assess property to the person by whom it was owned or claimed, or in whose possession or control it was, proceeds to declare that "no mistake in the name of the owner, or supposed owner, of real property, renders the assessment thereof invalid;" section

148 of the act is as follows: "When land is sold for taxes correctly imposed as the property of a particular person, no misnomer of the owner, or supposed owner, or other mistake relating to the ownership thereof, affects the sale or renders it void or voidable,"—a paraphrase being: When land is sold, for taxes correctly imposed thereon, as the property of a particular person (or when land is sold, as the property of a particular person, for taxes correctly imposed upon the land), no misnomer of the owner, or supposed owner, or other mistake relating to the ownership thereof, affects the sale or renders it void or voidable; and section 197 provides that "no assessment or act relating to assessment or collection of taxes is illegal on account of informality, nor because the same was not completed within the time required by law." These provisions of sections 13, 148 and 197 of the act of 1891 were incorporated into the Political Code of 1895, and appear as sections 3700, 3916 and 4014. Under these statutes it is plain that the listing of land in the name of a person other than the owner is but an irregularity or informality which, of itself, does not avoid the assessment nor render the tax illegal or unauthorized. The name of the owner of the real property is, for all purposes of taxation except perhaps the imposition of a personal liability, comparatively unimportant. Support for these views is found in *Landregan v. Peppin*, 86 Cal. 122, 24 Pac. 859; *Haight v. Mayor, etc.*, 99 N. Y. 280, 1 N. E. 883; *Merrick v. Hutt*, 15 Ark. 331; *Trust Co. v. Weber*, 96 Ill. 346; *State v. Matthews*, 40 N. J. Law 268; *Bradley v. Bouchard*, 85 Mich. 18, 48 N. W. 208; *Hill v. Graham*, 72 Mich. 659, 40 N. W. 779; *Stilz v. City of Indianapolis*, 81 Ind. 582; *Schrodt v. Deputy*, 88 Ind. 90; *Strauch v. Shoemaker*, 1 Watts & S. 166. The listing of lands to the wrong person affords no ground for restraining the collection, by sale of the property itself, of the taxes due thereon. Sections 4023 to 4026, inclusive, of the Political Code, prohibit courts and judges from enjoining the collection of any tax, and from restraining the sale of the property for nonpayment of any tax, except in those instances where the tax is illegal, or not author-

ized by law, or where the property is exempt from taxation, and provide the means and remedies whereby the rights of persons who deem the taxes irregularly or improperly demanded of the owners, or sought to be enforced against the property, may be guarded and protected, and of these remedies the plaintiff, if injured, may avail himself. In this case it is not pretended that the property was exempt, nor that the taxes were not levied in conformity with the law, nor is there a suggestion that the valuation was unjust or excessive. The plaintiff and his grantors knew—or, what is equivalent to knowledge, were bound to know—that the property was liable to taxation, and would be assessed annually, and that a listing to one other than the owner would not avoid an assessment otherwise regular. He and they knew when the taxes would fall due and should be paid, and he cannot, in this action, successfully urge, as a reason why his lands should be relieved of the lien for taxes, that he did not know of the assessment, and had no opportunity to discharge the taxes.

3. Section 4017 of the Political Code provides that the taxes assessed prior to July 1, 1895, must be collected under the laws in force at the time the assessment was made, and in the same manner as if the Code had not been passed. When the assessment of 1890 was made, a notice of four weeks before the sale of property for delinquent taxes was required, whereas the notice under which the treasurer now threatens to sell the lands is but a three weeks' notice. This irregularity or infirmity, whatever consequences might flow from it touching the proposed sale when made, has not the effect of rendering the taxes illegal or unauthorized by law. Nor does the fact that the treasurer intends to violate sections 3922 and 3923 of the Political Code, by exposing for sale, for the delinquent taxes for 1898, part of the lands purchased by the county at the sale for the taxes of 1897, and yet unredeemed, entitle the plaintiff to an injunction. Section 4026, *supra*, declares that the remedy provided by sections 4024 and 4025 "shall supersede the remedy of injunction and all other remedies which might be invoked to prevent the collection of

taxes or licenses alleged to be irregularly levied or demanded, except in unusual cases, where the remedy hereby provided is deemed by the court to be inadequate."

There is nothing in this case sufficient to warrant the granting of the equitable remedy of injunction against the intended sale. The remedy at law is plain and adequate for the redress of the plaintiff's alleged grievances. The judgment is therefore reversed, and the cause remanded, with instructions to sustain the demurrer to the complaint.

Reversed and remanded.

PENWELL, APPELLANT, v. BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LEWIS
AND CLARKE, RESPONDENT.

[No. 1,435.]

[Submitted October 13, 1899. Decided November 27, 1899.]

23	351
34	274
34	275
23	351
36	186

Deputy County Attorneys—Compensation—Power of County Commissioners—Statutes—Construction.

1. Political Code, Section 4596, declares that the "maximum annual compensation allowed to any deputy" is as follows,—setting out various officers whose salaries are declared "not to exceed" the sum fixed, but in providing for the salary of chief deputy county attorney the words "not to exceed" were omitted. Held, that, since the statute by a general controlling limitation provided that all the amounts fixed should be "the maximum annual compensation allowed," the words "not to exceed" were surplusage and hence the compensation of chief deputy county attorney was not fixed by the statute at a certain sum, but might be established at a sum less than the maximum named, provided the power to determine the number of deputies and their compensation, within the maximum limits prescribed, may be exercised by some authority elsewhere recognized by law.
2. Since deputy county attorneys are included by Act March 19, 1895, in Political Code, Section 4596, fixing the maximum salary of deputy county officers, the board of county commissioners have power to fix the salaries of deputy county attorneys under Session Laws, 1893, p. 60, establishing the number of deputy county officers, and providing that their compensation shall be determined by the board of county commissioners, within the maximum limits fixed by the act, though deputy county attorneys are not provided for therein.
3. Repeals by implication are not favored.

Appeal from District Court, Lewis and Clarke County; H. C. Smith, Judge.

ACTION by Lewis Penwell against the board of county commissioners of the county of Lewis and Clarke. Judgment for defendant, and plaintiff appeals. Affirmed.

Mr. T. J. Walsh, for Appellant.

Mr. C. B. Nolan, Attorney General, for Respondent.

MR. JUSTICE HUNT delivered the opinion of the Court.

By the agreed statement of facts before us, it appears that the plaintiff, Lewis Penwell, was, from and after January 1, 1899, the duly appointed, qualified and acting chief deputy county attorney, and only deputy county attorney of Lewis and Clarke county; that on January 31, 1899, he presented his bill for his salary for the month of January, 1899, amounting to the sum of \$150; that thereafter the bill was audited for \$125; that thereupon the board of county commissioners of Lewis and Clarke county, on the 1st day of February, 1899, allowed the bill for the sum of \$125, but refused to allow the bill for the sum of \$150. Plaintiff, Penwell, refused the warrant for \$125. The district court held that the action of the county commissioners was lawful, and denied the plaintiff's motion for judgment for \$150. Judgment was entered accordingly in favor of the defendant, and from this judgment the plaintiff appeals.

The decision upon this appeal requires a construction of the statutes pertaining to the salary of the chief deputy county attorney. Section 4596 of the Political Code is in part as follows:

"The maximum annual compensation allowed to any deputy or assistant is as follows:

"First and second classes:

"Under sheriff not to exceed eighteen hundred dollars.

"Each deputy sheriff not to exceed twelve hundred dollars.

"Each deputy clerk not to exceed twelve hundred dollars.

"Chief deputy clerk of the district court not to exceed fifteen hundred dollars.

"Other deputy clerks of the district court not to exceed twelve hundred dollars.

"Deputy treasurer not to exceed twelve hundred dollars.

"Deputy assessor not to exceed twelve hundred dollars.

"Chief deputy county attorney eighteen hundred dollars.

"Other deputy county attorneys fifteen hundred dollars."

The contention of appellant is that by this section his salary as chief deputy county attorney was fixed at \$1,800 per annum. He lays stress upon the omission of the words "not to exceed" from the statute in relation to the chief deputy and other deputy county attorneys, and forcibly argues that the frequent use of that expression elsewhere in the section quoted implies some significance to its singular omission in providing for the compensation of deputy county attorneys.

Much of this argument is answered, we think, by noting that the statute, in its general words of limitation, provides that "the maximum annual compensation allowed to any deputy or assistant is as follows"; for this limitation controls the compensation of any and all deputies included in the list of deputies directly thereafter specified in the text, and it just as effectively provides a maximum compensation to be allowed to these deputies where the words "not to exceed" are omitted as is the compensation limited in the instances where they do appear. We believe that all that could have been accomplished by the use of the words "not to exceed" had theretofore been done by fixing a maximum annual compensation, and that their repetition was therefore needless. The phraseology of the section seems to have been principally taken from an act of March 9, 1893 (Session Laws of 1893, p. 60), and an act of March 6, 1891 (Session Laws of 1891, p. 237), where a like tautology is apparent in fixing the compensation of various deputy officials other than deputy county attorneys. Deputy county attorneys were not included in these acts of 1891 and 1893, because the law nowhere specifically recognized such officials until the Codes of 1895 were adopted. When the Codes were enacted, however, the legislature of the session of 1895 whereat the Codes were adopted, and after

their adoption, constructed a schedule of salaries and fees by apparently remodeling the Session Laws of 1891 and 1893 as far as they went, and by adding to the list of deputy officials embraced in such laws a schedule of compensation for deputy county attorneys, whose official status, as stated above, had been first expressly recognized by the Political Code as just theretofore adopted, on February 25, 1895. But, in adding the new offices of chief deputy and deputy county attorneys, the legislature of 1895 avoided the tautology of its predecessors as to those offices never before known, and for which no provision had ever been made before the session of 1895. In our opinion, therefore, there was no evident intention on the part of the legislature, by the omission referred to, to fix the compensation of the deputy county attorney at a certain sum, or to take away the right to put it at a sum less than the maximum named, provided the power to determine the number of deputies and their compensation, within the maximum limits prescribed, may be exercised by some authority elsewhere recognized by the law.

Section 4602 of the Political Code provides in part as follows: "The whole number of deputies allowed the county attorney in counties of the first and second class must not exceed one chief deputy and one deputy; and in all other counties such deputies as may be allowed by the board of county commissioners, not to exceed one chief deputy and one deputy." This section is part of the act of March 19, 1895.

Section 4603 of the Political Code is as follows: "The number of deputies allowed to county officers and their compensation must not exceed the maximum limits prescribed in this chapter. The officers entitled to deputies must within thirty days after this Code takes effect file a certificate of appointment of the deputies in their office with the county clerk. The salaries must be allowed and paid monthly upon the order of the board of county commissioners and paid out of the contingent fund." This section is also part of the act of March 19, 1895, which also includes section 4596, heretofore quoted.

It will be seen that section 4602 relates to the number of

deputy county attorneys, while section 4603 is general in its language, only confining the number of deputies generally allowed to county officers and their compensation, within the limits prescribed "in this chapter"—so that, if the power to allow deputy county attorneys is vested in some authority, it must be ascertained, and, when that is found to exist, we may ask: Is it that same power which shall determine the number of deputies and the amount of their compensation, within the circumscribed limits of chapter IV. of the Political Code, which includes the sections and section 4596, just referred to? That the sections of the Political Code assume that there is an authority somewhere to make such a determination in respect to number and compensation is plain from the language of the sections cited; for it will not be presumed that provision for payment of deputy county attorneys was so carefully made with no regard to what authority was to make the decision upon the question of number and compensation, within the limits prescribed.

As before stated, in 1891, by an act approved March 6, 1891 (Session Laws of 1891, p. 235), the legislature provided for the maximum annual compensation of deputies for certain officers other than deputy county attorneys. This law also made general provision for allowing deputies and their compensation to county officers, "within the maximum limits named in this act," and placed the determination of these matters upon the boards of county commissioners. In 1893 (Session Laws of 1893, p. 60) the legislature amended Section 4 of the act of 1891, referred to, by revision of the compensation, and reenacted the clause providing that "the number of deputies and their compensation allowed to the county officers within the maximum limits named in this act shall be determined by the board of county commissioners," but again we fail to find any provision for deputy county attorneys.

The further question is then involved: Was the authority given to the board of county commissioners by the act of 1893 carried forward so as to obtain in respect to a determination of the compensation of deputy county attorneys, such officials

being recognized by the Codes of 1895 and the acts of 1895 amendatory of the Codes; or were the boards of county commissioners deprived by the act of March 19, 1895, of any such power through a repeal of that section of the law of 1893 which had given the necessary power? The act approved March 19, 1895, just mentioned, was an act to amend Sections 3133, 3135, 3137, 3138, and 3139, and to repeal Section 3136, of the Political Code, adopted February 25, 1895. Its provisions appear in the Political Code as Sections 4594, 4596, 4597, 4602, and 4603. Sections 4596, 4602, and 4603 have been already quoted in this opinion. Section 3136 of the Code, as first adopted and thereafter repealed by the act of March 19, 1895, merely authorized the appointment of deputies when in the judgment of the board of county commissioners the salary of the chief officer was inadequate and he was unable to perform the duties. The purpose of the repeal of this section has been stated by this Court in *Jobb v. Meagher Co.*, 20 Mont. 424, 51 Pac. 1034, in the following language: "The purpose of the legislature in repealing Section 3136 was to prune the Code of this section, which was not in harmony with that portion of the act of 1893 upon the subject; and, in order to disencumber the Code of a redundancy or repetition, Section 3139, the subject-matter of which was substantially embraced in the act of 1893, was amended by omitting those provisions already incorporated; and, as we think, a reading of Section 4603, which is Section 3136 as amended, discloses that intent." We do not attach importance to this section in the consideration of the question under examination.

It was also held in *Jobb v. Meagher Co.*, *supra*, that the section quoted from the act of 1893 remains in force, at least in so far as it vested in the boards of county commissioners the power to determine the number of deputies, and their compensation, allowed to sheriffs and other county officers whose existence was recognized by the Laws of 1891 and 1893. This conclusion was based upon the ground that there is nothing in the act of March, 1895, so inconsistent with the act of March 9, 1893, as to repeal that part of said act giving

authority to the board of county commissioners to determine the number of deputy sheriffs. We now go further, and, by virtue of the doctrine that repeals by implication are not favored, hold that by Sections 5181, 5184 and 5186 of the Political Code the section referred to in the law of 1893 was brought forward to apply to a more extended field; and though at the time of its original adoption it had reference alone to deputies of officers then recognized by the statute of 1893, and notwithstanding the fact that certain legislation affected by it had been repealed by conflict with later enactments, still that particular provision was brought forward by the act of March 13, 1895, (Section 5186, Political Code), and obtains, as affecting legislation adopted in 1895 embraced in Chapter IV of the Political Code, and is to be construed in harmony therewith. It became a general provision, applicable to the determination of the compensation of deputies of all county officers, and, being especially preserved from repeal as not repugnant to other enactments the legislative intent was to extend its applicability to deputy county attorneys and other deputies provided for by the legislation of 1895. (*State ex rel Aachen, Etc. Ins. Co. v. Rotwitt*, 17 Mont. 41, 41 Pac. 1004.)

We are strengthened in this opinion by a policy pervading the statutes which generally gives to the board of county commissioners power to control the number and compensation of deputy county officials. The legislature has selected such boards as best fitted to guard the economic interests of the county, doubtless recognizing that, in view of the fact that the county is to pay the deputies, a discretionary power in respect to their number and salaries might be exercised with more impartial regard to the public needs by boards of county commissioners, acting within certain bounds, than could be exercised by any other power, not excepting the legislature itself.

Our conclusion is that it was the intent of the legislation considered to give the boards of county commissioners power to determine the number of deputies to be allowed to the

county attorneys in counties of the first and second class, and to determine their compensation, subject, always, to the limits of Chapter IV of the Political Code.

The judgment is affirmed.

Affirmed.

STATE, RESPONDENT, v. PEEL, APPELLANT.

[No. 1,407.]

[Submitted October 30, 1899. Decided December 4, 1899.]

Criminal Law—Homicide—Trial—Jury—Peremptory Challenge—Waiver—Insanity—Nonexperts—Opinion—Cross-Examination—Experts—Hypothetical Question—Instructions—Irresistible Impulse—Presumption of Sanity—Burden of Proof—Reasonable Doubt—"Heat of Passion."

1. Where the state waived its fourth peremptory challenge, whereupon defendant exhausted his peremptory challenges, it was not error, on the panel's being filled and passed for cause, to permit the state to peremptorily challenge a juror who was in the box when the state waived its fourth challenge; since the state's waiver of its fourth challenge was not a waiver of any subsequent challenge it was entitled to.
2. The opinions of nonexpert witnesses, touching the mental condition of the person on trial, or the validity of whose act is in controversy, must be founded upon their own observation; they cannot be permitted to give an opinion founded upon facts learned from other sources than their own observation, hence, a nonexpert witness, who was not present at a homicide, cannot express his opinion as to the sanity of the accused, based both on his previous knowledge of accused and hearsay knowledge of facts attending the homicide.
3. A nonexpert witness should always speak as of the time of his own observation, he should not be permitted to express an opinion as to the temporary or permanent nature of mental disease.
4. On a trial for homicide, a nonexpert witness, giving his opinion as to the sanity of defendant, may be asked on cross-examination what he means by "insanity" and "unsoundness of mind," where there is no attempt to confuse him with technical distinctions.
5. Where defendant had unfriendly feeling towards deceased, and, falling in an attempt to procure decedent's prosecution, went into the street, and killed him, and insanity was pleaded as a defense, it was proper for the state to ask an expert his opinion of one's consciousness and knowledge of right and wrong and unlawfulness of his act, "if he had a grudge against another, and had rationally conversed with officers about it, and should go from them, and lie in wait for his enemy until he came within the vicinity, and should shoot him, saying, 'Take that,' and, having shot him, should turn and say that he would go to the jail, and give himself up, and within twenty minutes after the shooting should talk in a reasonable manner, apparently as conscious as he had ever been," since the state, in putting the hypothetical question, had a right to assume that the evidence tending to support its theory was true.
6. A question on the subject of insanity, put to an expert in a criminal trial, need not embrace all the elements of the law of insanity, but may limit the inquiry to the degree of intelligence possessed by defendant under the circumstances of the act.

7. In a prosecution for homicide, a charge "that if defendant knew, when committing the act, that it was wrong, and that he was mentally capable of choosing to do or not to do the act, and to govern his conduct accordingly, that he was guilty, even though he was not perfectly sane at the time of the act; and that, if his mental powers were so deficient that he had no will, conscience, or controlling mental power, or if, from violence of mental disease, his intellectual power was at the time obliterated, then he was not criminally responsible, the question being whether, at the time of the act, he had mental capacity to entertain a criminal intent, and whether he did in fact entertain it," is not erroneous in failing to charge as to irresistible impulse, where the only evidence of such impulse was defendant's statement that a few minutes before the homicide he was attacked by a dizzy spell, but had no recollection what occurred thereafter until the next day; since from his statement his act must have been the result of unconsciousness or delirium, while irresistible impulse implies knowledge of right and wrong in some degree.
8. When one commits an act, otherwise criminal, under an irresistible impulse, which is the result of overpowering mental disease, and which he cannot control, he is not criminally responsible.
9. The legal presumption of sanity is rebutted and disappears whenever sufficient proof is introduced to raise a reasonable doubt as to defendant's sanity.
10. The burden of establishing the defense of insanity by a preponderance of the evidence is never cast upon the defendant. If at the end of the state's case no proof has been introduced upon this subject, the legal presumption of sanity prevails, and the burden then devolves upon the defendant to produce some proof of his insanity, but he is not bound to produce any more than is sufficient to raise a reasonable doubt of his sanity, and the moment this appears the burden is at once upon the state to establish the guilt of the defendant beyond this reasonable doubt, since a reasonable doubt of the sanity of the defendant is, in a legal sense, a reasonable doubt of his guilt.
11. Where instructions on a material point in a criminal case are inconsistent, some correct and others incorrect, a conviction will be reversed.

Appeal from District Court, Madison County; M. H. Parker, Judge.

Martin Peel was convicted of murder in the first degree, and he appeals. Reversed.

STATEMENT OF THE CASE.

The defendant herein was found guilty of murder in the first degree in the district court of Madison county on December 16, 1898. Thereafter a motion for a new trial was made. This was heard and overruled on March 15, 1899. The court thereupon pronounced judgment fixing the death penalty.

The main facts leading up to the homicide are the following: William Ennis, the deceased, lived at Ennis, a village in Madison county, and kept a store there. The defendant resided near the village on a farm. The two had not been on friendly terms for two years or more. The origin of this unfriendliness is not revealed by the proof. In May or June

of 1897 a public hall at Ennis was burned. The deceased and his son William and others, at the instance of the deceased, met at the store shortly after the burning of the hall, and had some talk about going and hanging the defendant, whom they charged with burning the building. Nothing came of the meeting; no action was agreed upon. The deceased, the next morning, declared that they would wait until the defendant went to his mines in the mountains, when he could easily be disposed of with safety. During the early spring of 1898 rumors of the charges made against him by the deceased and associates came to the ears of the defendant; he was also told of the meeting at Ennis' store, and that the tracks of some man had been followed by Ennis and others from the scene of the fire to a point near defendant's house. The defendant thereupon became anxious to punish Ennis and his associates, insisting that they were guilty of a conspiracy to murder him, claiming also that his life was in danger. He talked of this with his neighbors and acquaintances. He several times visited the county attorney about prosecuting the deceased and his son. Being unable to obtain redress, as he thought, because this officer was in the employ of Ennis, he wrote to Hon. Wilbur F. Sanders, who resides in Helena, soliciting his services. Failing again to get the prosecution started, he went to Virginia City, the county seat, where court was in session, intending to see the district judge and lay his complaint before him. This was on June 18, 1898, the day of the homicide. He sought out Hon. M. H. Parker, the presiding judge, at the court house, but the judge refused to talk with him on the subject of his complaint, telling him he must seek advice elsewhere. Thereupon he turned, and went down the street to a point a short distance from the Madison Hotel, where he and the deceased had taken lunch on that day. While sitting there on a box, he saw the deceased leave the hotel, and pass down the street on the opposite side. After proceeding a short distance, deceased beckoned a friend across the street, and entered into conversation with him, standing with his side toward defendant, and apparently not

seeing him. Defendant arose, crossed the street, drew his pistol, and shot him, saying, "You will hang me, will you, you a—— o—— b——?" or similar words. The deceased died on July 4th thereafter. Defendant, after firing the shot, went immediately to the county jail, and delivered himself up to the sheriff. It does not appear whether, when the defendant went to Virginia City, he knew that the deceased was there. The defendant has appealed from the judgment of the district court and the order denying him a new trial. He alleges prejudicial error in many particulars.

Mr. S. V. Stewart and Messrs. Hartman & Hartman, for Appellant.

Mr. C. B. Nolan, Attorney General, and Mr. W. F. Sanders, for Respondent.

The *burden of proving* insanity as a defense, in a murder case, rests on the defendant—not to prove it beyond a reasonable doubt—but by such a preponderance of the evidence as to satisfy the jury of the truth of the plea. The legal presumption of sanity must be rebutted by the defendant, and the whole evidence must satisfy the jury by such a preponderance that, if the single issue of sanity or insanity was submitted to them in a civil case, they would find that he was insane. This is a rule adopted in a majority of the states, as well as in England, by well considered opinions. (*People v. Schryver*, 42 N. Y. 1; *People v. Travers*, 88 Cal. 233, and cases cited; *People v. Bowden*, 90 Cal. 195; *Boswell v. State*, 63 Ala. 307; *McKenzie v. State*, 26 Ark. 334; *State v. Hoyt*, 46 Conn. 330, S. C., 47 Conn. 518; *State v. Lewis*, 20 Nev. 333; *Westmoreland v. State*, 45 Ga. 225; *State v. Bruce*, 48 Ia. 530; *Brown v. Commonwealth*, 14 Bush. 398; *State v. Lawrence*, 57 Me. 574; *Commonwealth v. York*, 9 Metc. 93; *Commonwealth v. Eddy*, 7 Gray 583; *State v. Grear*, 29 Minn. 221; *State v. Erb*, 74 Mo. 199; *State v. Payne*, 86 N. C. 609; *People v. Allender*, 117 Cal. 82; *State v. Larkins*, (Idaho) 47 Pac. 945; *Bergin v. State*, 31 Oh. St. 111; *Kelch*

v. *State*, 55 Oh. St. 146; *Myers v. Commonwealth*, 83 Pa. St. 141; *Jones v. State*, 13 Tex. App. 1; *Dejarnette v. Commonwealth*, 75 Va. 867; *Strander v. State*, 11 W. Va. 745; Section 2081, Penal Code; *People v. Hong Ah Duck*, 61 Cal. 394; *People v. Knapp*, 71 Cal. 1; *People v. Dillion*, 8 Utah 92.)

The same principle has also been laid down in this state, in the case of *Territory v. Edmonson*, 4 Mont. 141, when it was held that in cases of homicide, the true and better rule, according to both principle and statute, is that matters of justification, excuse or mitigation should be proven, as any ordinary fact, by a preponderance of testimony.

MR. CHIEF JUSTICE BRANTLY, after stating the case, delivered the opinion of the Court.

1. During the selection of the jury, 12 men being in the box, and both parties having passed them for cause, counsel for state waived their fourth peremptory challenge. The defendant thereupon exhausted his seventh and eighth peremptory challenges, the box being filled again after each challenge. Both parties then having passed for cause, counsel for the state were permitted, over the objection of defendant, to peremptorily challenge one Connor, who was in the box at the time the state's fourth challenge was waived. Connor was ordered to stand aside, and another juror was called to take his place. He was found satisfactory to both sides, and thereupon, the defendant waiving further challenges, the jury were sworn. The action of the court in permitting the challenge of Connor is assigned as error. In *State v. Sloan*, 22 Mont. 293, 56 Pac. 364, we held that the parties must exercise their right of peremptory challenge alternately, the state exhausting one challenge and the defendant two, until both are satisfied, or their challenges have all been used. The corollary to this rule is that, where either party fails to challenge in his turn he is deemed to waive the challenge or challenges he might use at that time. But the rule goes no further than is necessary to preserve the alternation required by the statute. (Code of Civil Procedure, Section 1059; Penal Code,

Section 2057.) It does not follow that either party waives any other challenge he may still have. His refusal to challenge may be taken by the court as an announcement that he is satisfied with the jury as then constituted but not that he will be satisfied with it when differently constituted by the change wrought by challenges exercised by the other side. There is no provision of the statute prohibiting either party from thereafter using a challenge upon any juror in the box so long as he has one to use. He may use it as he pleases at any time before the jury is finally accepted and sworn. We think the court was clearly right in overruling the objection, both upon principle and authority. (1 Thompson on Trials, Section 94; *People v. Ah You*, 47 Cal. 121; *Fountain v. West*, 23 Iowa 9; *People v. Carrier*, 46 Mich. 442, 9 N. W. 487; *Hamper's Appeal*, 51 Mich. 71, 16 N. W. 236; *Kennedy v. Dale*, 4 Watts & S. 176; *People v. Montgomery*, 53 Cal. 576; *State v. Pritchard*, 15 Nev. 74.)

2. The defense relied on at the trial was insanity. Riblett, a witness for defendant, was his nearest neighbor, having lived upon a farm adjoining the defendant's for several years. He was permitted to detail fully his acquaintance and intercourse with the defendant, and his observation of his conduct and condition during his acquaintance with him, particularly with reference to the two years immediately prior to the shooting. This narration included an account of two attacks of illness suffered by defendant—one during the winter of 1896-97, and the other during the winter following; his incomplete recovery, and his subsequent feeble and nervous physical condition during the spring of 1898. It also included several conversations with defendant about the behavior of Ennis and his son towards himself, and defendant's attempts to bring them to punishment, one of which took place two days before the homicide. He also stated that he had heard of the shooting two days after it occurred. He was then asked: "After hearing of the shooting, and taking into consideration the facts that you have testified about, and your long knowledge and acquaintance with Mr. Peel, did you

have any opinion then, taken in connection with the shooting, as to the condition of his mind at the time of the shooting?" Upon objection by the state, the court refused to permit the witness to answer, on the ground that the opinion of a layman as to the mental condition of the defendant, based in part upon facts not derived from his own observations, is incompetent. To this ruling the defendant excepted. The question is awkwardly expressed, but it was evidently intended that the witness, in giving his opinion, should base it upon his own observation as detailed by him, and also upon his hearsay knowledge of the facts attending the shooting. As the witness was not an expert, the ruling of the court was clearly correct. While the opinions of nonexpert witnesses are often the best and only evidence at hand touching the mental condition of the person on trial, or the validity of whose act is in controversy, the opinion expressed must be founded upon their own observation. (*Territory v. Hart*, 7 Mont. 489, 17 Pac. 718, and authorities cited; *Territory v. Roberts*, 9 Mont. 12, 22 Pac. 132; 1 Clevenger, Med. Jur. of Insanity, p. 580.) It is only a person skilled in the particular science, art, or trade concerning which the investigation is had who can be permitted to give an opinion founded upon facts learned from other sources than his own observation. (Code of Civil Procedure, Section 3146.) If he has had an opportunity to observe, he may speak from observation. When he has had no such opportunity, he may hear facts detailed by other witnesses, and express an opinion thereon; or the question may be put to him in hypothetical form, founded upon facts thus detailed. (Lawson on Expert Evidence p. 221, rule 42.) And herein lies the distinction between the office of an expert and that of a layman when called upon in such case for an opinion. If a lay witness may be permitted to include one material fact, or group of facts, learned by hearsay among those derived from his own observation, as in the question under consideration, and to express an opinion thereon, there is no reason why any number of such facts may not be so included. In such case the opinion of the witness, in so

far as it would be based upon the extraneous facts, would in no respect be different from that of an expert witness, and the important and substantial distinction between the offices of the two would be entirely destroyed. . (Lawson on Expert Evidence, p. 538.) The witness was afterwards permitted to express his opinion as to the mental condition of defendant, basing it upon his own observation. This was within the rule and the defendant has no cause for complaint.

In this connection the court instructed the witness to express the opinion formed by him with reference to his observations of defendant up to and including the time he last saw him. The witness answered in conformity with this direction, expressing the opinion as still retained by him. Fault is found with this action of the court, counsel for defendant contending that the witness should have been allowed to state his opinion as to the mental condition of defendant at the time of the shooting. Here again we think the court was right, because the nonexpert witness should always speak as of the time of his observation. To have allowed this witness to do otherwise would be equivalent to permitting him to give an opinion upon the character of the mental disease, and as to whether it probably continued up to the date of the shooting. The witness could not speak of a condition he did not observe, nor should he be permitted to express an opinion as to the temporary or permanent nature of the disease. This is the province of the expert. (1 Clevenger Med. Jur. of Insanity 588; *Blake v. Rourke*, 74 Iowa 519, 38 N. W. 392; *Denning v. Butcher*, 91 Iowa 425, 59 N. W. 69.)

On cross-examination the witness was asked to tell the jury what he meant by ‘insanity’ and ‘unsoundness of mind.’ The court directed him to answer. This he did, explaining in his own way what meaning he attached to those terms. There was no attempt to compel him to give a technical definition of them, nor to confuse him by questions pertaining to technical distinctions. This was clearly within the range of proper cross-examination.

3. In rebuttal the state introduced Dr. Miller as an expert

upon the question of defendant's insanity. Among other hypothetical questions, he was asked the following: "Where a party has a grudge against another, and had avowed it, and had in a rational way conversed with lawyers and judges about it, and he should go from them, and lie in wait for his enemy, or remain in the vicinity until he appeared on the sidewalk, and then should get up and go across the street from where he was, and draw a revolver, and shoot him, saying, 'Take that,' or words to that effect, and, having shot his enemy, should turn around again, and say, 'I will go to the jail and give myself up,' and within twenty minutes or half an hour should talk the matter over in a reasonable manner, apparently as conscious as ever he had been immediately before the shooting, what would you say as to the fact of his consciousness and knowledge of right and wrong and knowledge of the unlawfulness of his act at the time of the shooting, from these circumstances?" Defendant objected on the ground that the hypothesis assumed that the defendant entertained a grudge against deceased, and that he was lying in wait for deceased at the time of the homicide, an assumption not justified by the proof; and also on the ground that it involved an erroneous statement of the law of insanity as a defense in criminal prosecutions. The objection was overruled, and the witness answered, "I should consider he was conscious of what he was doing." The objection was without merit. The evidence had shown without contradiction that there had been unfriendly feeling between defendant and deceased for some time, though the cause of it did not appear. It had also shown, as set forth in the statement of facts leading up to the homicide, that the defendant had been charged by deceased with burning the public hall at Ennis; that there had been some talk by deceased and others of hanging defendant for this crime; that he had heard of this talk, and was so wrought up by it that he sought to have deceased and his son punished for a conspiracy to murder him; that, having failed to get the prosecution under way, he had, as a last resort, gone to the judge then engaged in holding court at Virginia

City; that, upon being told by the judge that he must go elsewhere for advice, he had gone at once to a point near the hotel where deceased was stopping, and remained there; that he was armed; and that, when he saw deceased leave the hotel, and proceed down the other side of the street, he immediately went toward him, and shot him. It further appeared from the defendant's own statement that, though he was entirely innocent of the charge made against him by deceased and his son, he believed they intended to take his life when a suitable opportunity presented itself. In another part of his testimony he had also stated that he had sought out the deceased because he was the only one that he feared of those who attended the meeting at Ennis, where the hanging was discussed, and that he was on friendly terms with everybody in the community except deceased. Can any reasonable person doubt for a moment that the defendant, under these circumstances, if he was sane, entertained towards the deceased and those associated with him the strongest feeling of resentment and ill will? If he did not, he surely was not subject to the passions that ordinarily sway mankind, or else had schooled himself to such a degree of self-control and Christian forbearance as to have become a remarkable instance in proof of the possible attainment by mankind of absolute moral perfection. The state's theory of the case was that defendant was and is so far a reasonable moral agent as to be responsible under the law. Upon this assumption counsel were proceeding, and it was necessary that they be allowed to proceed in this way in order to properly try the case. In putting the hypothetical question to the expert, they had a right to assume as established, for the time being, all the facts in evidence tending to support their theory. It was a legitimate inference from the evidence, under this theory, that the defendant retained a grudge against the deceased, and that, prompted by a desire to gratify his feelings of revenge, he lay in wait for the opportunity to strike the fatal blow. It was for the jury to say, after considering all the evidence introduced by both sides, whether the facts, thus assumed as established for the

time being, were really established, and whether the opinion of the witness was worthy of consideration. (Lawson on Expert Evidence, 152, 153; 1 Thompson on Trials, Sections 607-610, and cases cited.)

Counsel were not compelled to so frame their question as to embrace in it a statement of all the elements of the law of insanity. Capacity to distinguish between right and wrong with reference to the particular act in controversy is certainly a prerequisite to legal responsibility, and whether or not the defendant possessed such capacity was necessarily a subject of legitimate inquiry in the trial of this case. If he did not possess it, he could not properly be convicted of any degree of homicide. Counsel were properly permitted to direct their inquiry in such a way as to develop proof tending to show the degree of intelligence possessed by the defendant under the particular circumstances. If they choose to limit the inquiry to this particular point, and there stop, it was not error in the court to permit it. It was for the court to state the law applicable to this defense upon the facts as they were presented.

4. In this connection complaint is made that the court failed to properly instruct the jury on the law applicable to this defense, the particular criticism being that the instructions are not sufficiently specific as to irresistible impulse. In this, we think, counsel are in error. The court, with the exception hereafter noticed, instructed the jury fully and fairly, and the law, as stated in the charge, is the more logical rule, if not based upon the weight of authority in this country. Of the several paragraphs of the charge on this phase of the case, we quote two as illustrative of the court's view:

No. 36. "You are instructed that if, from all the evidence in the case, you believe, beyond a reasonable doubt, that the defendant committed the crime of which he is accused, in manner and form as charged in the information, and that at the time of the commission of such crime the defendant knew that it was wrong to commit such crime, and was mentally capable of choosing either to do or not to do the act or acts constituting such crime, and of governing his conduct in accordance

with such choice, then it is your duty, under the law, to find him guilty, even though you should believe from the evidence that at the time of the commission of the crime he was not entirely and perfectly sane."

No. 37 "You are instructed that, in order to be criminally responsible, a person must have intelligence and capacity to have criminal intent and purpose; and if his mental powers are so deficient that he has no will, or no conscience, or no controlling mental power, or if, from the overwhelming violence of mental disease, his intellectual power is, for the time, obliterated, he is not criminally responsible,—the question to be determined being whether, at the time of the act, he had the mental capacity to entertain a criminal intent, and whether in point of fact he did entertain it."

Mr. Bishop (1 Cr. Law, Sec. 381, subd. 2) says: "Insanity, in the criminal law, is any defect, weakness or disease of the mind rendering it incapable of entertaining, or preventing its entertaining in the particular instance, the criminal intent which constitutes one of the elements in every crime." From this definition of insanity, criminal responsibility is to be determined solely by the capacity of the defendant to conceive and entertain the intent to commit the particular crime. If there is no intent, there is no crime. In the formation of this intent there must concur knowledge or intellectual comprehension, and the power of choice. An absence of the former necessarily implies the want of the latter, for the latter cannot, in reason, exist without it. On the other hand, the former, as a scientific fact, may exist, in some degree at least, without the latter. It therefore follows that one may have mental capacity and intelligence sufficient to distinguish between right and wrong with reference to the particular act, and to understand the consequence of its commission, and yet be so far deprived of volition and self control by the overwhelming violence of mental disease that he is not capable of voluntary action, and therefore not able to choose the right and avoid the wrong. The second instruction quoted is taken from the text at page 126, Vol. I, of Dr. Clevenger's recent

work on Medical Jurisprudence of Insanity, heretofore cited. At another place the same author says: "To be criminally responsible, a man must have reason enough to be able to judge of the character and consequences of the act committed, and he must not have been overcome by an irresistible impulse arising from disease." (*Id.* p. 174.) Assuming, as we do, that Mr. Bishop's definition of insanity is correct, and sufficiently broad to cover all cases where the question of responsibility arises, the statement by Dr. Clevenger is a direct logical result therefrom, and the doctrine that when one commits an act, otherwise criminal, under an irresistible impulse, which is the result of an overpowering mental disease, and which he cannot control, he is not criminally responsible, must be admitted. Mr. Bishop recognizes the doctrine, basing it upon the law of necessity, and insists that it is the duty of every judge to recognize and apply it as a part of the fundamental law of the land. (1 Bishop, Cr. Law, Sec. 383b.) Mr. Wharton (Wharton's Cr. Law, Sec. 45), after discussing the subject, states the law thus: "The conclusion we must reach, therefore, is that an irresistible homicidal impulse in an insane person is a good defense, though such insane person was able to distinguish between right and wrong. With a sane person, however, it is not a defense, as the law makes all sane persons responsible for their impulses." It is, we think, the more humane doctrine, and in accord with the more advanced state of medical science and judicial reason, though courts of high standing—as in New York, California, Kansas, Georgia, North Carolina, Missouri and others—repudiate it, and adhere to the doctrine of the right and wrong test. The following authorities are cited: Taylor's Med. Jur. 734; *Com. v. Rogers*, 7 Metc. (Mass.) 500; *Stevens v. State*, 31 Ind. 485; *Walker v. State*, 102 Ind. 502, 1 N. E. 856; *Conway v. State*, 118 Ind. 482, 21 N. E. 285; *Parsons v. State*, 81 Ala. 577, 2 South. 854; *State v. Windsor*, 5 Har. (Del.) 512; *Ortwein v. Com.* 76 Pa. St. 414; *Taylor v. Com.*, 109 Pa. St. 262; *Com. v. Mosler*, 4 Pa. St. 264; *Graham v. Com.*, 16 B. Mon. 587; *Blackburn v. State*, 23 Ohio St. 146; *State v. Pike*, 49

N. H. 399; *State v. Jones*, 50 N. H. 369; *State v. Johnson*, 40 Conn. 136; *Anderson v. State*, 43 Conn. 514; *Dejarnette v. Com.*, 75 Va. 867; *State v. Felter*, 25 Iowa, 67; *State v. Meuserter*, 46 Iowa 88; *Dacey v. People*, 116 Ill. 555, 6 N. E. 165; Hochheimer Law of Crimes, Sec. 20.

But, while we believe this to be the better rule, we agree with Mr. Bishop where he further says, in speaking of the right and wrong test: "In a case wherein beyond controversy the defect extends only to the intellectual powers, and there is no pretense that the party cannot control his own actions,—no proof tending to show any insanity except the partial, which veils simply the understanding and not the whole man,—this right and wrong test, thus seen to be the more common form of putting the question to the jury, is correct in legal theory, and practically not misleading. For it should be borne in mind that in all issues the charge to the jury should disclose the law applicable to whatever facts the evidence tends to establish, not to any which it does not." (1 Bishop Cr. Law, Sec. 386, Subd. 2.)

Returning now to the test laid down in the instructions quoted, we see that they distinctly recognize the doctrine of irresistible impulse as the result of disease. In our opinion, they are well suited to the facts of this case. There was no proof tending to show in the defendant, at the time of the shooting, the existence of an irresistible impulse, except in so far as it might be inferred from the statement of the defendant himself, who testified in his own behalf, and stated that, as he left the court house, he was attacked by a "dizzy spell," and had no recollection of what occurred thereafter until the following morning. Even this would seem to rebut the idea of any such condition, and tend rather to show that the shooting, if the result of any phase of insanity, was the act of unconscious madness or delirium; for, logically, the expression "irresistible impulse" implies knowledge of right and wrong in some degree, but, coupled with it, the absence of power, resulting from a disordered mind, to successfully resist the impulse to do the criminal act. The court could

not instruct the jury on every phase or manifestation of insanity. The law was declared generally upon this subject with such suggestions as were suitable to the facts of the case; and it was left to the jury, as was proper, to find from the proof upon the issue of insanity. (*Stuart v. State*, 1 Baxt. (Tenn.) 178.) The court was also careful to draw the distinction between the impulse of anger or passion which does not relieve from responsibility and the phase of insanity which we are here considering. This should be done in all cases of this character, so that the wicked impulses of the evil passions, which every man is, under the law, bound to keep in restraint, may not be confounded with that phase of mental disease which the law, out of tenderness for human life and liberty, deems a sufficient excuse for crime. (*State v. Brooks*, 23 Mont. 146, 57 Pac. 1038.)

5. Upon the burden of proof under the plea of insanity the following instruction was given:

“No. 42. You are instructed that the law presumes every person to be sane and responsible for his acts until the contrary be shown by the evidence, and, when insanity is set up as a defense to an alleged criminal act, the burden of proof is upon the defendant to show by a preponderance of the evidence that he was affected by insanity, as explained in these instructions, at the time of the act, to such an extent that he did not know that it was wrong to commit such criminal act, and that he was not mentally capable of choosing either to do or not to do the act or acts constituting such crime, and of governing his conduct in accordance with such choice; but if, upon all the evidence in the case, the jury entertain a reasonable doubt as to the sanity of the defendant at the time of the commission of the act complained of, they must acquit him.”

This instruction was followed by another paragraph correctly defining “preponderance of evidence” as applicable to civil cases, thus emphasizing the necessity for the defendant to sustain his defense by a preponderance of the evidence. We think this was prejudicial error. The instruction is inconsistent with itself, in that, after telling the jury that the

burden is upon the defendant to establish insanity by a preponderance of the evidence, it again tells them to acquit him if they have a reasonable doubt upon the whole case. It also conflicts in this regard with other instructions as to reasonable doubt. It is wrong in principle, because, under our view of the law, the burden of establishing this defense by a preponderance of the evidence is never cast upon the defendant.

As to the inconsistency of the instruction with itself and with others upon the subject of reasonable doubt, it is sufficient to say that, wherever instructions are upon a material point, the one correct and the other incorrect, this court will not presume that the jury followed the correct instruction, but will reverse the judgment, and order a new trial. (*State v. Rolla*, 21 Mont. 582, 55 Pac. 523.)

The first part of the paragraph states a wrong principle: The doctrine of reasonable doubt must be applied to every fact material and necessary to establish the defendant's guilt. It should be applied in all criminal cases,—to those in which insanity is the defense as well as others. Yet under this statement the defendant could be acquitted upon a reasonable doubt which might arise only after he had produced proof sufficient to incline the balance in his favor on the issue of insanity. If there should be an equipose, he could not be acquitted, because the proof would not have weight to the degree at which the reasonable doubt could come to his aid. Under the same condition of proof in a civil case, where the burden was upon the plaintiff to make out his case, the defendant would be entitled to a judgment in either instance. Nor is the fallacy of the position obviated by the statement that the legal presumption of sanity must be rebutted by the defendant. This presumption is rebutted and disappears whenever sufficient proof is introduced to raise a reasonable doubt as to defendant's sanity. And it makes no difference from which side it comes. From the moment it appears the burden is at once upon the state to establish the responsibility of the defendant, and that beyond a reasonable doubt; for legal responsibility is a necessary ingredient of guilt, and a reason-

able doubt of the sanity of the defendant is, in a legal sense, a reasonable doubt of his guilt. If at the end of the state's case no proof has been introduced upon this subject,—and the state is not bound to introduce any in the first place,—the legal presumption of sanity remains unimpaired, and prevails. The burden then devolves upon the defendant to produce some proof tending to show that he was not responsible at the time the criminal act was committed, but he is not bound to produce any more than is sufficient to raise a reasonable doubt. If this is not then successfully rebutted by the state, he is entitled to an acquittal. It is only in this sense that the burden ever rests upon him under Penal Code (Sec. 2081), as was clearly explained by Mr. Justice Hunt in *State v. Brooks, supra*. In *Davis v. U. S.*, 160 U. S. 467⁹, 16 Sup. Ct. 353, 40 L. Ed. 499, Mr. Justice Harlan, in an able and lucid opinion, discusses the question under consideration, collating many of the adjudicated cases. This case is cited with approval in *State v. Brooks, supra*, and the final summing up of Justice Harlan is there quoted. The question under consideration here was not directly involved in that case, but the conclusion reached in *Davis v. United States* is so well supported by reason and authority that we here approve it again, and adopt it. In *Territory v. Edmonson*, 4 Mont. 146, 1 Pac. 738, and *Territory v. Tunnell*, 4 Mont. 148, 1 Pac. 742, a different construction was given a provision substantially the same as section 2081, *supra*, (section 40, Fourth Division, Rev. Stat. 1879.) We are satisfied that the interpretation there given to this provision was founded on an erroneous view of the law, and to the extent to which these cases conflict with our present conclusion as stated in *State v. Brooks, supra*, and this case, they are overruled.

6. It is contended that the court erred in defining the expression "heat of passion" in instructing the jury with reference to the crime of manslaughter. The definition given is the same in substance as the one which was disapproved in *State v. Sloan*, 22 Mont. 293, 56 Pac. 364. On another trial this can be avoided. No harm resulted from it in this case,

since, evidently, the jury did not have occasion to consider it, having found the defendant guilty of murder in the first degree. (*State v. Brooks, supra.*)

Let the judgment and order refusing a new trial be reversed, and the cause remanded, with directions to grant a new trial.

Reversed and remanded.

HAGGIN, APPELLANT, v. SAILE ET AL., RESPONDENTS.

[No. 1,142.]

[Submitted July 18, 1899. Decided December 4, 1899.]

23	375
23	438
23	375
24	124
23	375
25	271
28	375
29	26
23	375
32	163

Water Rights—Equity—Injunction—Findings—Exceptions—Implied Findings—Abandonment—Riparian Rights—Instructions.

1. The Code of Civil Procedure, 1896, (Sec. 1111 *et seq.*) recognizes the system of implied findings, which applies to equity as well as law cases, under this system a judgment will not be reversed on appeal for defects in the findings unless the losing party has proceeded in accordance with the requirements of the provisions of Sec. 1114 *et seq.*
2. A defective finding of an abandonment of a water right, in an injunction suit, is not on appeal, ground for reversal of the judgment when the losing party has failed to follow Section 1114 *et seq.* of the Code of Civil Procedure.
3. A person has no rights as a riparian holder as against one who actually diverts and appropriates water for beneficial uses under statutes recognizing the right of appropriation.
4. The abandonment of a water right is a question of fact to be determined from the acts and intention of the party who is alleged to have abandoned the right; mere nonuser of a water right by itself does not constitute an abandonment; but a voluntary nonuser of water by a purchaser of a water right, without any intention to resume use thereof, and without the assertion of possession or title for a number of years after purchase, and where such purchaser has permitted the water to be taken, appropriated and used by others adversely for years, warrants an inference of abandonment.
5. Since findings of a jury in an equity suit are advisory merely, a judgment will not be reversed on appeal for the giving of erroneous instructions, where the court in making its findings of fact, approved some of those found by the jury, and made other findings, all the findings of the court being supported by the evidence.

Appeal from District Court, Deer Lodge County; Theo. Brantly, Judge.

INJUNCTION by James B. Haggin against Raimond Saile and another. From a decree in favor of defendants, and from

an order overruling a motion for a new trial, plaintiff appeals. Affirmed.

Mr. Wm. Scallon, Mr. J. K. McDonald and Mr. W. W. Dixon, for Appellant.

The water right was an appurtenance of the land. (*Sweetland v. Oleson*, 11 Mont. 27; *Sloan v. Glancy*, 19 Mont. 70, 76.) Upon the question of abandonment appellant refers the court to the following authorities: (*Gassert v. Noyes*, 18 Mont. 216; *Smith v. Hope Min. Co.*, 18 Mont. 432.) This latter case is also an authority upon what is necessary to constitute adverse possession. And upon the question that the court must not instruct the jury upon questions of fact. See *Wastl v. M. U. R. Co.*, 17 Mont. 213; *Knowles v. Nixon*, 17 Mont. 473; *McShane v. Kenkle*, 18 Mont. 208. Appellant refers to the following authorities, as to what is necessary to constitute an adverse possession, and calls the attention of this Court to the fact that in all the instructions upon this point given by the court below, as well as in the finding upon this question made by said court, the necessity of the adverse possession being continued is nowhere mentioned, although this continuity is one of the essential elements of adverse possession: (*San Francisco v. Fulde*, 37 Cal. 349; *Griggsby v. Clear Lake Water Co.*, 40 Cal. 396; *Hanson v. McCue*, 42 Cal. 303; *Cave v. Crafts*, 53 Cal. 135; *Anaheim Water Co. v. S. T. Water Co.*, 64 Cal. 185; *Paige v. Rocky Ford Co.*, 83 Cal. 84; *Alta L. & W. Co. v. Hancock*, 85 Cal. 219; *Last Chance Co. v. Heilbron*, 86 Cal. 1.) The court erred in its instructions because it instructed the jury upon questions of fact and in regard to the credibility of witnesses, whereas all these matters are purely within the province of the jury and should not be commented upon by the court, nor should the court instruct the jury in relation to these matters. See *Wastl v. M. U. R. Co.*, 17 Mont. 213 and *Knowles v. Nixon*, 17 Mont. 473, above referred to.

Mr. F. Adkinson and Mr. E. Scharnikow, for Respondents.

This action was one in equity, and so treated by the court below, and by both the plaintiff and defendant. Special issues having been submitted to the jury to make their findings thereon, such findings were advisory only, and therefore such instructions to the jury cannot be considered on appeal. (*Larolor v. Kemper*, 20 Mont. 19; *Sweetser v. Dobbins*, 65 Cal. 529, 4 Pac. R. 540; *Evans v. Ross*, (Cal.) 8 Pac. Rep. 89.) The lower court adopted the jury's findings, and also added further findings of its own. These are sufficient to sustain the judgment as well as the conclusions of law, and the findings of the court are fully sustained by a clear preponderance of the evidence. The Montana water right laws are in complete derogation of the common law of riparian rights. (Black's Pomeroy on Water Rights, Sec. 106.)

The right of the first appropriator may be lost by the adverse possession of another; and where such other person has had the continued, uninterrupted and adverse enjoyment of the water, or some certain portion of it, for a certain length of time, the law will presume a grant. (Black's Pomeroy on Water Rights, Sec. 98; *Union Water Co. v. Crary*, 25 Cal. 504, 85 A. D. 145; *Smith v. Logan*, 18 Nev. 149, 1 Pac. Rep. 680; *Woolman v. Garringer*, 1 Mont. 544.) The burden rests on the party submitting to the adverse user, that the use was by license or permission, and further, that license or permission cannot be presumed, but must be proved. (*Law v. McDonald*, 9 Hun. 23; *White v. Chapin*, 12 Allen 516.) Adverse possession having once begun, is presumed to continue, in the absence of evidence to the contrary. (*Abbott v. Page*, 92 Ala. 571, 9 So. Rep. 333; *Clements v. Lampkin*, 34 Ark. 598; *Bodfish v. Bodfish*, 105 Mass. 319; *Hesperia Co. v. Rogers*, 83 Cal. 10, 23 Pac. Rep. 196; *Walden v. Gratz*, 14 U. S. (1 Wheat) 292; *Elyton Co. v. McElrath*, 53 Fed. Rep. 763.) Water held and used adversely for five years next before suit is brought, establishes title in the user. (*Smith v. Green*, 109 Cal. 228, 41 Pac. Rep. 1022; *Cox v. Clough*, 70 Cal. 345, 11 Pac. Rep. 733; *Davis v. Gale*, 32 Cal. 35; *American Co. v. Bradford*, 27 Cal. 366.) Disseisin may be

proven by evidence of open and exclusive possession, claiming title against all persons whomsoever, without proof of actual notice to the disseisee. (*Samuels v. Borrowscles*, 104 Mass. 207; *Wilson v. Williams*, 52 Miss. 493.) It is not necessary that the adverse character of defendants' possession should be brought home to the actual knowledge of plaintiff by affirmative proof. If the defendants' possession is adverse to all others, open and notorious, it is sufficient in its character, whether plaintiff knew the facts or not. (*Scruggs v. Scruggs*, 43 Mo. 142; *Warfield v. Lindell*, 38 Mo. 562, 90 A. D. 443; *Murray v. Hoyle*, 92 Ala. 559, 9 So. Rep. 368; *Glencoe v. Wadsworth*, 48 Minn. 402, 51 N. W. Rep. 378.) A failure to use for a time is competent evidence of abandonment; and if such nonuser continues for an unreasonable period, it may fairly create a presumption of intention to abandon. (*Sieber v. Frink*, 7 Colo. 148, 2 Pac. Rep. 901; *Dorr v. Hammond*, 7 Colo. 79, 1 Pac. Rep. 693.) Ignorance of adverse holding by defendants, does not excuse the plaintiff. (*Brownson v. Scanlan*, 59 Tex. 222; *Key v. Jennings*, 66 Mo. 356; *Closs v. Samm*, 27 Iowa, 503; *School Dist. v. Lynch*, 33 Conn. 330.)

PER CURIAM.—Action for a perpetual injunction restraining defendants from the use and diversion of the waters of Glover's canyon, in Deer Lodge county. Plaintiff claimed under an appropriation made by one Glover. Defendants denied plaintiff's title, and pleaded title in themselves by appropriation, and also pleaded the statute of limitations. Special issues, including that of abandonment by plaintiff, were submitted to a jury, which issues were found in favor of the defendants. Thereafter the court made findings of its own, wherein certain findings of the jury were adopted, and others made to conform with the court's own views. Conclusions of law were also stated, and upon these the court made a decree that the defendants were the owners of the right to the use of the water in controversy. Plaintiff thereafter moved for a new trial, which motion was overruled. Plaintiff appeals from

the judgment and order overruling the motion for a new trial. The action was commenced August 27, 1888, and has been before this court once before. (*Haggin v. Saile et al.*, 14 Mont. 79, 35 Pac. 514.)

We have repeatedly gone over the testimony had upon the trial of this case, giving it our close attention, while considering the argument of appellant that the evidence is insufficient to justify the findings of the court and jury; and our conclusion is that the evidence is sufficient to sustain the finding and conclusion upon the material point that plaintiff abandoned any rights he may have had to the usufruct of the waters in controversy. To set forth the evidence contained in the record upon this question is unnecessary—we merely state the conclusion which we have reached.

It is said the court failed to find abandonment as a fact, but only so found as a conclusion of law. The jury expressly found abandonment, while the court found, as a fact, that after the latter part of 1883 plaintiff never at any time made use for any purpose of any of the waters in controversy; and as a conclusion of law the court stated that plaintiff, prior to the bringing of this suit, abandoned whatever right he had to the use of the water.

Conceding that the finding that the plaintiff never used the waters in controversy after some time in 1883 is defective as a finding of an abandonment, still the plaintiff is in no position to ask a reversal in this Court, because he failed to follow the Code of Civil Procedure, by pointing out the defectiveness of such finding, and because he failed to preserve his exceptions, if there was a failure on the part of the lower court to remedy the defect. The statutes (Section 1114 *et seq.*, Code of Civil Procedure) provide that in cases tried by the court no judgment shall be reversed on appeal for defects in the findings, unless exceptions be made in the court below for a defect in the findings, and, in cases of exceptions for defective findings, the particular point or issue upon which the party requires a finding to be made, or the particular defect to be remedied, shall be specifically and particularly designated,

and, upon failure of the court to remedy the alleged defect, the party moving shall be entitled to his exceptions, and the same shall be settled by the judge as in other cases. This rule applies to equity as well as law cases. (Hayne on New Trial & App. Sec. 244.)

It is our opinion that the present Codes (section 1111 *et seq.*) recognize the system of implied findings, and that, under that system, where there are defective findings the judgment appealed from will not be reversed unless requests and exceptions were made and saved. (*Gallagher v. Cornelius*, 23 Mont. 27, 57 Pac. 447.) Hayne on New Trial & App. Sec. 238, traces the history of the statutes of California upon the subject of implied findings, and notes the difference between such a system and one of express findings. He demonstrates that, as the Codes are now in this state, it is incumbent upon the losing party to take proper steps to except to the defects in the findings of fact, pointing out the particular omissions of which he complains, and that, if he does not proceed according to the statutory requirements in this respect, he cannot secure a reversal for defects in the findings filed; "all omitted issues being presumed to have been found in favor of the party for whom judgment was rendered." "In consequence of this presumption," he continues (section 239), "the losing party could never have a reversal upon the findings unless they were entirely inconsistent with the judgment, and could not be reconciled with any state of facts which might have been proved, and upon which the judgment might be supported." The presumption then prevails that the omitted issues necessary to supply the defects in the findings upon the abandonment by plaintiff have been found in favor of defendants, so we will not reverse the judgment upon the finding which appears in the record.

The evidence also sustains the finding that during June, 1883, defendant Saile settled upon the land he claims, and made an appropriation of all the waters of Glover's canyon flowing by his home, for agricultural and domestic uses, and that he has used such waters for beneficial purposes upon his land ever since.

These matters are determinative of the case, requiring an affirmance of the order and judgment appealed from. The suggestion that the plaintiff has rights as a riparian holder can have no force as against defendant Saile, who, in June, 1883, actually diverted and appropriated water for beneficial uses under the statutes of the territory recognizing the right of appropriation.

It is said the court erred in its view of the law as to what constituted an abandonment. We do not think so. If we could refer at all to the instructions to the jury, to ascertain the views entertained by the learned judge upon the law of abandonment,—and it is to them that plaintiff goes,—it is disclosed that he regarded it as a question of fact, to be determined from the acts and intention of the party who was alleged to have abandoned the rights in controversy, and such acts and such intention should be gathered from all the facts and circumstances in the case. He did not decide the point against plaintiff upon the theory that mere nonuser of a water right by itself constituted an abandonment, but he proceeded upon the line that a voluntary nonuser of water by a purchaser of a water right, without any intention to resume use thereof, and without the assertion of possession or title for a number of years after purchase, and where such a purchaser has permitted the water to be taken, appropriated and used by others adversely for a period of years, warranted an inference of abandonment. This we believe is thoroughly correct on principle.

It is urged that certain instructions given to the jury were erroneous. But, if they were, we will not reverse a judgment in an equity case because of erroneous instructions upon certain issues, where the court exercised its independent judgment in making its own findings of fact, and where such findings are supported by the evidence, without regard to the issues found by the jury. That is this case, for the verdict of the jury was not conclusive upon the questions submitted,—it was advisory only,—and the judge made his own findings, approving some of those found by the jury, and making

some of his own. By this action, all the findings that he made, whether or not in harmony with those that had been made by the jury, became the court's findings, and, if supported by the evidence, must be upheld, notwithstanding an erroneous charge to the jury. It follows that an erroneous instruction could do plaintiff no injury, if the findings of the court were justified by the evidence, and the determination of that question is made by sifting the facts without regard to the action of the jury. (*Lawlor v. Kemper*, 20 Mont. 13, 49 Pac. 398; *Sweetser v. Dobbins*, 65 Cal. 529, 4 Pac. 540; *Richardson v. City of Eureka*, 110 Cal. 441, 42 Pac. 965.) Possibly exceptional cases may arise where this rule should not be applied, but the present is not one of them. We therefore place our affirmance upon the issue of abandonment, which was decided by the court against plaintiff. This decision is sustained by the evidence.

Various errors are assigned upon rulings in the admission and exclusion of evidence, but we find no error affecting the issue of plaintiff's abandonment.

The judgment and order appealed from are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY, being disqualified, took no part in this decision.

BANDMANN, RESPONDENT, v. DAVIS, TRUSTEE,
APPELLANT.

[No. 1,149.]

[Submitted October 16, 1899. Decided December 4, 1899.]

Contract — Damages for Breach — Lease — Pleading — Practice.

In an action to recover a judgment for damages occasioned by the breach of a certain contract: *Held*, that the particular contract upon which the action was based was not a lease.

ON MOTION FOR REHEARING.

1. The objections urged at the trial to the reception of evidence under a complaint were, that one of the causes alleged in it arose *ex delicto*, whereas the other arose *ex contractu* and was not separately stated and numbered: *Held*, that a motion to exclude evidence, or an objection to receiving it, is not the remedy for the intermingling in one count of several causes of action.
2. A demurrer is the only remedy by which a complaint may be attacked upon the ground that causes of action are improperly united therein.

Appeal from District Court, Missoula County; Frank H. Woody, Judge.

ACTION by D. E. Bandmann against A. J. Davis, as trustee of the First National Bank of Butte City, a corporation. From a judgment in favor of plaintiff and from an order denying a new trial, the defendant appeals. Affirmed.

COPY OF THE CONTRACT UPON WHICH THE ACTION
IS BASED.

“This agreement, made and entered into this 18th day of April, 1895, by and between Daniel E. Bandmann, of Missoula, Montana, party of the first part, and A. J. Davis, Trustee, of Butte City, Montana, party of the second part:

“Witnesseth, That whereas, the said second party is trustee of certain bonds executed by the Canon Ditch Company, and is also lessee of the said Canon Ditch; and, whereas, the said first party is the owner of property through which said ditch has right of way, and resides near the head of said ditch;

“Now, therefore, this agreement, said party agrees to repair the said ditch from its head to the lower end of his ranch and to put the same in good running order and to maintain the same during the season of 1895; that is to say, from the present time to the close of the irrigating season, for and in consideration of the sum of (\$250) two hundred and fifty dollars, to be paid as he shall need from time to time during the said season; said second party to furnish at the Blackfoot Mills such lumber as shall be needed for repairs, and to supply such nails and oakum in Missoula as shall be necessary to keep up the said ditch; the said second party agrees to use all due diligence in apprehending and punishing

any person or persons who in any manner without authority shall interfere with the operation of said ditch or any part thereof.

"In addition to the above consideration, the said first party shall and receive without further consideration than above specified, not to exceed a one-tenth of the water of said ditch, according to the measurement of the same; the first party to deliver in the flume of said second party nine-tenths of said waters.

"And, further, said second party, or his representative or agent, shall at all times have access to any portion of said ditch, and have full charge of all head-gates or openings from said ditch, and the right to close the same, and open all waste-gates as he may see fit; provided, that at all times the said first party shall be entitled to receive the one-tenth of the waters of said ditch, as before provided.

"In witness whereof, the parties hereto have set their hands and seals the day and year first above written.

"DANIEL E. BANDMANN,

"Party of the First Part.

"ANDREW J. DAVIS,

"Party of the Second Part."

Mr. E. N. Harwood, and Mr. George A. Clark, for Appellant.

Mr. Marcus L. Crouch, and Mr. F. C. Webster, for Respondent.

PER CURIAM.—The subject of this action is a contract, its cause is the breach thereof by defendant, and its object is to recover a judgment for the damages occasioned by such breach. From a judgment for \$1,600 in favor of the plaintiff, and from an order denying a new trial, the defendant appeals.

The consideration of the many specifications of error has engaged our careful attention. We are satisfied that no error prejudicial to the defendant was committed by the district court, and that substantial justice under well recognized prin-

ciples of law has been meted out by the judgment. To discuss and determine seriatim the points made by the defendant would serve no useful purpose, and we therefore refrain from encumbering the records and reports with comparatively useless matter. We may observe, however, that the contract upon which the action is based is not a lease.

The judgment and the order refusing a new trial are affirmed.

Affirmed.

ON MOTION FOR REHEARING.

[Decided January 29, 1900.]

The earnestness with which counsel for the defendant have pressed the motion for a rehearing has induced us to re-examine the record and again consider their various assignments of alleged error. Further deliberation has served only to strengthen the conclusion announced in the former opinion. That the contract which was the subject of the action is not a lease is apparent; but, if it were a lease, the evidence offered by the defendant would, if received (and in his abstract he treats it as proof adduced), have been conclusive against him; for the plaintiff was ousted from the possession of the property let by the defendant to him by one Cook, who had title under a sheriff's deed to the property, issued after a sale under a money judgment in his favor, which judgment had been duly docketed and was a lien prior to the inception of any right in the defendant to take possession. True, the defendant held a mortgage from the then owner of the real property which antedated the docketed judgment, but the mortgage was in the common form and contained nothing authorizing new dealings or agreements which would affect a lien subsequently acquired; and the lien by judgment, although inferior to the lien of the mortgage held by the defendant, attached prior to the making of the new agreement between the defendant and the mortgagor. It is plain that Cook was the owner of the real estate at the time he ousted the plaintiff therefrom, his ownership being subject to the defendant's

mortgage; and that the defendant is liable to the plaintiff for the breach of the covenant of peaceable possession and quiet enjoyment, implied in the lease.

One of the causes of action is not separately stated and numbered, and is not as well averred as it might have been; the objections urged at the trial to the reception of evidence under it were that one of the causes alleged in the complaint arose *ex delicto*, whereas the other arose *ex contractu*, and was not separately stated and numbered. A motion to exclude evidence, or an objection to receiving it, is not the remedy for the intermingling in one count of several causes of action; nor is there remedy other than demurrer, by which the complaint may be attacked upon the ground that causes of action are improperly united therein. Moreover, each cause of action arose out of the same contract, and they were such as may properly be united in the same complaint. In this Court the defendant urges, in addition to the objections made below, that the statement so attacked is insufficient in substance to constitute a cause of action. As has been said, it might have been better draughted, but it is an example of the defective statement of a cause of action, and not of a defective cause of action alleged.

If we assume that it was the duty of the defendant to prevent damage to his crops and trees if he could do so by a trifling expense, the position of the defendant is not bettered, for the reason that the evidence tended to show that the plaintiff made reasonable but unsuccessful efforts to obtain water, and the charge of the court upon this point, as well as upon the whole case, was at least as favorable to the defendant as the law warrants.

No error prejudicial to the defendant was committed, and the motion for a rehearing is denied.

Denied.

CASES DETERMINED

IN THE

SUPREME COURT

AT THE

DECEMBER TERM, 1899.

PRESENT:

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. WILLIAM H. HUNT, } Associate Justices.
THE HON. WILLIAM T. PIGOTT, }

PURDUM, APPELLANT, v. LADDIN ET AL., RESPONDENTS.

[No. 1,389.]

[Submitted December 4, 1899. Decided December 5, 1899.]

Mines and Mining—Declaratory Statement—Location—Description.

Political Code, Section 3612, providing that the declaratory statement containing a description of a mining claim filed with the county clerk must contain the location and description of each corner, with the markings thereon, is mandatory, and a compliance with its provisions is necessary to perfect a valid location, hence a statement describing a claim by metes and bounds, and giving no description of the corners or the markings thereon, is invalid.

Appeal from District Court, Madison County; M. H. Parker, Judge.

(387)

23	387
27	375
127	370
23	387
28	226
23	387
30	131
23	387
29	4
29	478
23	387
34	279
34	489
23	387
40	285

ACTION by James W. Purdum against A. Laddin and others. From an order sustaining defendants' motion for a new trial, plaintiff appeals. Affirmed.

Mr. R. B. Smith and *Mr. L. D. Hall*, for Appellant.

Mr. J. E. Healey, for Respondents.

PER CURIAM.—The plaintiff, claiming ownership, except as against the United States, of the Cataract lode mining claim, situate in Madison county, brought this action to recover possession thereof from the defendants. The answer denies that plaintiff is the owner, and puts in issue the validity of the location under which the plaintiff asserts title; and avers that the defendants are owners of the Cliff lode mining claim, which embraces the ground alleged by the plaintiff to be included within the exterior boundaries of the supposed location of the Cataract lode mining claim. A verdict for the plaintiff was set aside, and a new trial granted. The plaintiff appeals.

During the progress of the trial the plaintiff offered in evidence the declaratory statement of the location of the Cataract lode mining claim, containing the following reference to the corners: "This location is distinctly marked on the ground, so that its boundaries can be readily traced by a stake set at discovery shaft, where this notice and statement is posted this 15th day of October, A. D. 1895, and by substantial posts or monuments of stone at each corner of the claim, and the exterior boundaries of the claim, as marked by said posts or monuments, are as follows, to wit: Beginning at the N. E. corner, No. 1, a nut pine tree on the south bank of Cataract creek, about $\frac{1}{2}$ mile S. W. of Mammoth Lake, and extending 1,500 feet in a westerly direction to N. W. corner, No. 2, on the southwest bank of Cataract Lake, thence, southerly direction, 600 feet, to corner No. 3, thence easterly 1,500 feet to corner No. 4, which corner is a balsam a fir tree; thence north 600 feet to place of beginning." The defendants objected to the introduction of the declaratory statement for the reason, among others, that it does not comply with

Section 3612 of the Political Code of Montana, in that it fails to show the location and description of each corner, with the markings thereon. The objection was overruled, the declaratory statement admitted in evidence, and the defendants excepted. The order sustaining the motion for a new trial was granted upon the sole ground that the court erred in admitting the declaratory statement.

In granting a new trial, the district court did not err. Section 3612 of the Political Code provides that, within 90 days from the date of posting upon the claim the location notice required by section 3611, there must be filed with the county clerk a declaratory statement, which must contain, among other things: "7. The location and description of each corner, with the markings thereon." The statute is mandatory, and substantial compliance with its provisions is necessary to perfect a valid location. "A location is not made by taking possession alone, but by working on the ground, recording, and doing whatever else is required for that purpose by the acts of congress and the local laws and regulations." (*Belk v. Meagher*, 104 U. S. page 284, 26 L. Ed. 735; *Garfield M. & Mining Co. v. Hammer*, 6 Mont. 53, 8 Pac. 153.) That the legislative assembly had power to enact sections 3610 to 3613 of the Political Code is, in this state, too firmly established to permit of serious discussion or doubt; and that the provisions of these sections are mandatory, reasonable and not in conflict with any act of congress, seems clearly within the principles announced or tacitly recognized in *O'Donnell v. Glenn*, 8 Mont. 248, 19 Pac. 302; *McCowan v. McClay*, 16 Mont. 234, 40 Pac. 602, and *Sanders v. Noble*, 22 Mont. page 119, 55 Pac. 1037.

The cases of *Russell v. Chumasero*, 4 Mont. 309, 1 Pac. 713; *Flavin v. Mattingly*, 8 Mont. 242, 19 Pac. 384; *Upton v. Larkin*, 7 Mont. 449, 17 Pac. 728, and *O'Donnell v. Glenn*, *supra*, were decided prior to the adoption of the Political Code of 1895, and under statutes which did not require that the trees, stakes or monuments must be marked so as to designate the corners of the mining claim, nor that the declaratory state-

ment must contain the description of, and the markings on, each corner,—in other words, until 1895 the declaratory statement was sufficient, in that respect, if it described the claim in the manner provided by Section 2324 of the Revised Statutes of the United States. (Rev. St. Mont. 1879, page 590, Sec. 873; Comp. St. Mont. 1887, Fifth Division, page 1054, Sec. 1477.)

The order granting a new trial is affirmed.

Affirmed.

HORST, RESPONDENT, v. SHEA, ET AL., APPELLANTS.

[No. 1,155.]

[Submitted October 17, 1899. Decided December 13, 1899.]

*Mines and Mining—"Mining Claims"—Placer Ground—
Adverse Possession—Actions—Statute of Limitations.*

Code of Civil Procedure 1895, Section 494 (Compiled Statutes 1887, First Division, Section 40), providing that no action for the recovery of mining claims, lode claims excepted, or for the recovery of possession thereof, shall be maintained, unless it appears that the plaintiff or his assigns was seized or possessed of such mining claims within one year before the commencement of such action, is not applicable to real estate patented as placer ground, and hence adverse possession of such land for one year after the issuance of the patent is not sufficient to divest the owner of title, and such adverse possession does not bar an action for its recovery.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

ACTION by Barbara Horst against Con. Shea and others. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendants appeal. Affirmed.

Mr. J. L. Wines, and Mr. M. L. Wines, for Appellants.

Whether a patented placer mining claim be called real estate or not, still respondent is estopped from denying the nature and characteristics of the ground embraced within the patent,

or the nature of the title, and will not be heard to say in an action in which she relies upon such patent that the ground ceases to be placer ground as soon as the patent was issued. This applies to the grantee named in the patent and to all subsequent owners in privity with such grantee. (Rawle on Covenants for Title, 4th Ed. pp. 388-389; 3d Ed. p. 407; *Gibson v. Chouteau*, 39 Mo. 536.) The plaintiff cannot claim title, and thereby protection under such title, and at the same time deny its availability to her contestants. (*Robertson v. Pickrell*, 109 U. S. 608-617.)

The officers of the land department judicially determined, in the issuance of a patent in this case, that the mining ground embraced in such patent was placer ground, and this determination is conclusive in this action. *St. Louis Smelting & Refining Co. v. Kemp*, 104 U. S. 636, and in this case a mining claim is defined to be "a parcel of land containing precious metals in its soil or rock." Our contention is that this action is barred by the provisions of the statutes and codes, by reason of the fact that the ground in controversy is, and was, a placer mining claim, and that more than one year had elapsed after the issuance of the patent, and before the commencement of this action, during all of which time appellants were in the actual, open, notorious, exclusive and adverse possession, by improvement and enclosure, and by claiming to be the owners thereof, as against all the world, including the government of the United States. Courts of eminent ability, and after an exhaustive examination of this question, have directly decided in favor of our contention. Without deciding the question now before the Court, this Court has upheld the one year statute of limitations by holding that the general law of limitations of actions for the recovery of real estate does not apply to placer mines and quartz lodes in construing Chapter 80, Laws of 1877. (*Davis v. Clark*, 2 Mont. 310.) We next desire to call the attention of the Court to a decision by the Supreme Court of the State of Nevada, that of *Southend Mining Co. v. Tinney*, 35 Pac. Rep. 89, 93-94.) It will be found upon page 93, above cited, that the statute of limitations in

the state of Nevada, having relation to mining claims or mining ground, was identical with the Montana statutes now under examination, except that the period was two years instead of one. In that case the mining claim in controversy was a patented claim, and the same contention was urged as is being urged in the case now before the Court. What the Supreme Court of Nevada says in that case touching the definition of the word "seized or possessed" is applicable to the statute now under examination, as the same words are used in the Montana statute. Under the old definition of the words "seized or possessed," these words usually applied only to a title in fee, and not to a mere possession. "Seized" or "possessed" of the fee was the form of expression generally used, and such words were usually supposed to exclude everything less than a fee simple title. In the state of California, the same as in Montana, they have a statute giving a materialman, who furnishes material or performs work or labor upon any mining claim, a lien for such materials or labor. In a case decided by the Supreme Court of California, the very ridiculous position was taken that a party furnishing materials for, or labor upon, a mining claim, could not avail himself of the statute unless such mining claim was unpatented. (*Bewick v. Muir*, 83 Cal. 368-372.) If an argument can be based upon the fact that the Legislature of the State of Montana has more than once used the expression "mining claim," giving such expression the same definition for which we contend, then such argument can be found in Sections 524 and 2130 of the Code of Civil Procedure. If the contention should be made that the term "mining claim," as used in those two sections, would exclude patented claims, it would not be considered tenable for one moment by this Court. The same contention is equally untenable when made in the case now under examination.

Mr. F. T. McBride, for Respondent.

MR. JUSTICE PIGOTT delivered the opinion of the Court.

This action was brought to recover the possession of a parcel of land lying in the county of Silver Bow. From a judgment in favor of the plaintiff, and from an order denying a new trial, the defendants have appealed. The admitted facts are these: On the 10th day of January, 1891, the United States, by patent of that day, granted to one John Noyes and one Elmira Noyes certain placer mining ground, including the land in controversy, the title to which became vested by *mesne* conveyances in the plaintiff. For $3\frac{1}{2}$ years next before the commencement of the action,—January 7, 1896,—the defendants held adverse possession of the land for the purpose only of residence thereon. Chapter II of Title III of the First Division of the Compiled Statutes of 1887 prescribed five years', and Chapter II of Title II of Part II of the Code of Civil Procedure prescribes ten years', adverse possession of real property as necessary to defeat an action brought to recover it; and, since less than five years of adverse possession has been shown, the defendants do not now, although they did in the district court, urge in defense the statute of limitations of either five or ten years applicable to real property in general. They insist, however, that their adverse possession for one year after the issuance of the patent is sufficient to divest the plaintiff of, and invest them with, the title to the land in dispute. Counsel argue that Section 40 of the First Division of the Compiled Statutes of 1887, and Section 494 of the Code of Civil Procedure of 1895, which are in terms identical, are applicable to real estate patented as placer ground. If this be true the judgment is erroneous, and the court erred in refusing to grant a new trial. The plaintiff contends that the sections last cited treat of unpatented placer mining claims, and have no reference to the adverse possession of such land after the legal title thereto has passed from the United States. The single ultimate question, therefore, is: Does the adverse possession of real property for one year after it has been patented as placer ground bar the maintenance of an action for its recovery? The question in another form is: Do the words "mining claims," in sections 40 and 494, include lands patented as placer ground?

Sections 486 and 494 of the Code of Civil Procedure are as follows:

“Section 486. In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof, within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title, for ten years before the commencement of the action.”

“Section 494. No action for the recovery of mining claims (lode claims excepted), or for the recovery of possession thereof, shall be maintained, unless it appears that the plaintiff or his assigns was seized or possessed of such mining claims within one year before the commencement of such action.”

Aside from the change in section 2 hereinafter mentioned, which was wrought for a time by an act approved on January 11, 1872, these sections have been part of the statute law of the territory and state of Montana since the 9th day of February, 1865, when “An Act concerning Limitations” was approved; in that act they appear as sections 3 and 2, respectively, and are found on page 466 of the Bannack Statutes. Section 2 has, with the exception noted, been continually in force, by revisions, compilations, codifications and re-enactments, from the day it became a law until the present time, and is found incorporated in the Compiled Statutes of 1887, as Section 40 of the First Division, and in the Code of Civil Procedure of 1895 as Section 494. Section 4 of the act of 1865 has likewise been continued in effect from the 9th day of February, 1865, the only difference being in the time required to rebut the presumption attending the legal title; it is Section 32 of the First Division of the Compiled Statutes of 1887, and Section 486 of the Code of Civil Procedure of 1895.

Until the 26th day of July, 1866, persons exploring the public domain, and removing minerals therefrom, were, technically, trespassers. By the terms of an act approved on that

day (14 Statutes at Large, Chapter CCLXII, page 251) congress declared the mineral lands of the public domain to be free to exploration and occupation, subject to such regulations as might be prescribed by law, and to such customs and rules of miners as might not conflict with the federal laws. The act also limited the extent of lode claims, and provided that the title to lode mines might be acquired. But not until the act of July 9, 1870 (16 Statutes at Large, Chapter CCXXXV, page 217; Revised Statutes, Secs. 2329-2331), did congress define the maximum area of placer claims, or permit locators to obtain patents for them. Intermediate the act of July 26, 1866, and the act of July 9, 1870, placer locations, if made in conformity with local rules and customs, were valid, whatever their form or area; by the act of 1866, the government granted a privilege and license for the exploration and occupation of its placer lands, but they could not be patented. As has been remarked, prior to July 26, 1866, federal legislation was silent on the subject of public mineral lands in the territory of Montana. At the time, therefore, that Section 2, *supra*, now Section 494 of the Code of Civil Procedure, was passed—February 9, 1865—it was not possible to obtain the legal title to placer mining claims, for they were not patentable as such until the act of July 9, 1870, became operative; hence it is manifest that the first legislative assembly carefully distinguished between property held as an unpatented placer claim and land to which the legal title had been secured from the United States, prescribing that adverse possession for one year of a placer mining claim should bar an action for its recovery, whereas three years of such possession was declared necessary to divest the beneficial ownership of, or the legal title to, other real property. The reasons for the enactment of section 2 may be only surmised. As has been already observed, there was not, anterior to July 9, 1870, any provision of the federal law limiting the area of placer claims, and examination of the Session Laws of Montana, fails to disclose any statute prescribing their size,—by the act of 1866 the matter seems to have been confided for

regulation entirely to the varying customs of mining districts, and prior thereto congress had failed to recognize any right or privilege whatever with respect to the occupation or exploration of the public mineral lands. Although the first legislative assembly, by sections 3 and 6 of an "Act relating to the discovery of gold and silver quartz leads, lodes or ledges, and of the manner of their location," approved on December 26, 1864, found on pages 327 and 328 of the Bannack Statutes, restricted the area of "claims on lodes" to not more than 200 feet along the lode, with 50 feet on each side for working purposes, and required the "notice of the discovery or pre-emption upon any lead, lode or ledge" to be filed for record in the office of the county recorder within 15 days after discovery or pre-emption, yet the act of March 5, 1883, was the first statute which even went so far as to authorize the recordation of declaratory statements of placer locations (Laws of 1883, p. 95; see *Moxon v. Wilkinson*, 2 Mont. 421, 424.) Under the circumstances existing in 1865, it may not be unreasonable to assume that the purpose of the first legislative assembly in enacting section 2 was, as expressed in the dissenting opinion in *South End Mining Co. v. Tinney*, 22 Nev. 67, 35 Pac. 106, to prevent the holding of large tracts of the public mineral lands "without any title but that of the right of possession, and without working the same for an unreasonable length of time." At the time section 2 was enacted, and until the act of congress of July 9, 1870, a placer claim in Montana might embrace, unless prohibited by some rule or custom of the mining district, as much of the public domain as the locator could occupy; the right to continue in possession was not dependent upon the performance of any labor on, or exploration of, the claim. It is not unlikely that section 2 was designed to lessen or check abuses which might be practiced under the conditions existing in 1865, tending to retard the mineral resources of the territory. What the particular reason or motive was which caused the first legislative assembly to except placer mining claims from the supposed operation of the three years' period of limita-

tion, and to prescribe as applicable to them, and to them only, the period of one year, is not of importance, since the legislative intent so to do is unmistakable. Whether, under the decisions and intimations in *Davis v. Clark*, 2 Mont. 310; *King v. Thomas*, 6 Mont. 410, 12 Pac. 865; *Weibold v. Davis*, 7 Mont. 107, 14 Pac. 865; *Mayer v. Carothers*, 14 Mont. 274, 36 Pac. 182; *Mining Co. v. Taylor*, 100 U. S. 37, 25 L. Ed. 541; *Belk v. Meagher*, 104 U. S. 279, 26 L. Ed. 735, and *Redfield v. Parks*, 132 U. S. 239, 10 Sup. Ct. 83, 33 L. Ed. 327,—the provisions of the section are enforceable, we do not decide. That question is not presented in this case.

The first re-enactment of sections 2 and 4 of the act of February 9, 1865, was the one of January 12, 1872, contained in sections 2 and 4 of Chapter XLI of "An act revising, re-enacting and codifying the general and permanent laws of Montana territory," and found on page 515 of the Codified Statutes of 1871-72. The codification made no change in the sections as originally passed; even the numbering was retained. It repealed all acts and parts of acts revised or re-enacted therein, and all acts or parts of acts repugnant to its provisions; and declared that its provisions, so far as they were the same as those of existing laws, should be interpreted as continuations of such laws, and not as new enactments. But on January 11, 1872, an act, appearing on pages 591 and 592 of the Laws of 1871-72, was approved, amending the act of February 9, 1865, by changing section 2 of the earlier act so that one year's adverse possession of unpatented lode, as well as placer, claims, operated as a bar to recovery. It expressly provided that the period of one year's adverse possession should not apply to placer mines or quartz lodes held under patent from the United States, but that sections 3, 4, 5, 6 and 7 of the act of February 9, 1865, prescribing the three years' statute of limitations as a bar to the recovery of "real property," should apply to them. It will be observed that the amendatory act was approved on January 11, while the act re-enacting sections 2 and 4 was approved on January 12, 1872. In view of the repealing clause referred to, it may be

that the act of January 12th, being the later expression of the legislative will, annulled so much of the act of January 11th as prescribed against actions to recover unpatented lode claims the bar of one year's adverse possession, although in *Davis v. Clark, supra*, the contrary seems to have been taken for granted or assumed without discussion of the act of January 12th; whether or not such was its effect we need not decide, for section 674 of an act approved on February 16, 1877, found at page 215 of the Laws of 1877, did repeal the acts of January 11th and 12th, and at the same time re-enacted sections 2 and 4 of the act of 1865 as sections 40 and 32 of the new statute.

The defendants contend that while the legislative assembly, by the act of January 11, 1872, prohibited the application of the term "mining claims" to patented claims, yet by the repeal of that act, and the omission ever afterwards expressly to exclude patented claims from the operation of the statute prescribing one year's adverse possession of placer mining claims as a bar, the lawmaking power intended to include patented claims within the term "mining claims," and that therefore Section 40 of the First Division of the Compiled Statutes of 1887, and Section 494 of the Code of Civil Procedure of 1895, apply to both patented and unpatented placers, notwithstanding the fact that these sections are copies of section 2 of the act of 1865, which was passed before patents to any kind of mining claims could be issued. In our opinion, the position is untenable.

It is plain that the amendment of January 11, 1872, formally excluding patented placer claims from the operation of section 2 of the act of 1865, was wholly unnecessary; for such claims were never within the intent and meaning of the statute, and could not have been in contemplation when the section was first enacted; the amendment in this respect made no change whatever in section 2. The primary purpose of the amendment was to subject actions to recover unpatented lode claims to the bar of the statute of limitations prescribed for similar actions concerning unpatented placer claims, and thus

place both species of claims on an equal footing with respect to the effect of adverse possession. Before the amendment, actions for lode claims not patented were barred, if barred at all, by the three years' adverse possession applicable to real property held under legal title. The legislative assembly probably entertained the fear that, by amending section 2 so as to make its provisions applicable to lode claims, without express negation by apt language of the design to include those held under patent, the section might be susceptible of an interpretation by which actions to recover patented lodes, as well as those not patented, would be deemed within its purview. Had this section been amended so as expressly to prescribe the period of one year's adverse possession as sufficient to bar actions for placer claims and *unpatented* lode claims, a doubt, at the least, would arise with respect to the inference or presumption deducible from the employment of the word "unpatented" to qualify lode claims, coupled with the omission to use that word in connection with placer claims; it would be argued, and the argument would be not without force, that the presence of the word in the one instance, and its absence in the other, was significant of an intention to include all placer claims, both patented and unpatented.

We think section 2 of the act of 1865, as re-enacted in sections 40 and 494, *supra*, must receive the same interpretation now that it did when originally passed; it should not, by construction, be held to include within the phrase "mining claims" real property patented as a placer mining claim. Each re-enactment of section 2 was a mere continuance, not a repeal, of its provisions; and there is nothing in the repeal of the act of January 11, 1872, or elsewhere, which is sufficient to raise the presumption that the legislative assembly ever intended to embrace within the words "mining claims" in section 2 any placer claims other than those held by a mere possessory title.

Another consideration furnishes a potent reason in support of our conclusion. Placer mines are, as a rule, of short life. They are soon exhausted. When the deposits which consti-

tute the only value of placer claims as mines have been extracted or removed, or when it becomes unprofitable to work them, the land is not infrequently devoted to other purposes. It is a matter of common knowledge that many tracts or pieces of land which were originally patented as placer claims, having lost commercial value as mines, are occupied for the purposes of trade, business and residence,—indeed, in the case at bar, the possession of the defendants was for the purpose last named, and for that alone. Every patented placer claim eventually loses its distinctive character, and becomes assimilated in all respects to other real property. If the position of the defendants be correct, a city lot, once a placer claim, and patented as such a score of years ago, now owned by a remote grantee of the person who acquired title from the government, would be comprehended by the provisions of Section 494 of the Code of Civil Procedure of 1895, and adverse possession of the lot for one year by a stranger would bar an action for its recovery, as well as invest the disseisor with title as against the late owner, although as to all other real estate, namely, real estate not patented as placer claims, ten years of adverse possession is necessary to produce the effect accomplished by one year's adverse possession of the lot held under a placer patent. The statute does not warrant such a construction. Without a clear expression of the legislative will requiring the interpretation for which defendants contend, the presumption that the statute was intended to bring about or permit results so unreasonable and unjust may not be indulged.

The judgment and the order appealed from are correct. Each is therefore affirmed.

Affirmed.

MURRAY ET AL., PLAINTIFFS AND APPELLANTS, v. POL-
GLASE ET AL., DEFENDANTS AND APPELLANTS.

ADAMS ET AL., INTERVENORS AND RESPONDENTS.

[Nos. 1,170, 1,199.]

[Submitted October 24, 1899. Decided December 18, 1899.]

*Mines and Mining—Adverse Claim—Intervention—Receiver's
Receipt—Fraud—Cancellation of Entry—Annual Repre-
sentation Work—Relocation.*

1. Revised Statutes U. S. Section 2326, and Act Congress March 3, 1881, amendatory thereof, allow 60 days from the filing of an application for a patent to a mining claim for the filing of adverse claims, and require suits to establish such adverse claims to be brought within 30 days thereafter. Code Civil Procedure 1895, Section 1322, provides that it is sufficient to confer jurisdiction upon the court, in an action to establish an adverse claim for a patent to a mining location, if it appears from the pleadings that the application for the patent had been made, and the adverse claim filed and allowed in the proper land office. *Held*, that one who has not filed his adverse claim under the statute cannot intervene in an action to determine adverse claims to a location, though he claims an interest in the premises adverse to both plaintiff and defendant.
2. An entryman of a mining claim, who makes final entry thereof, and obtains the receiver's receipt therefor, showing he is entitled to a patent, is not relieved of the necessity of doing the annual representation work where such receipt was obtained by fraud.
3. The cancellation, by the authorities of the land office, of a receiver's receipt, adjudicates the fact that the entryman obtained no title at all by his entry, and by such act of the land office the entryman is deprived of the ability to claim any right under said receipt.
4. Where a receiver's receipt, showing that the entryman of a mining claim is entitled to the patent, is subsequently annulled for fraud practiced in obtaining it, and the entryman has failed to do the annual representation work, the claim is subject to relocation.
5. Where a receiver's receipt, under which plaintiff is seeking to establish an adverse claim to a mining location, is shown to have been canceled, evidence of defendant's adverse location and publication of notice are admissible in evidence.

Appeal from District Court, Silver Bow County; William C. Clancy, Judge.

ACTION by James A. Murray and others against Jane Polglase and others to establish an adverse claim to a mine location, in which W. W. Adams and others intervened.

23	401
24	185
23	401
27	813
23	401
30	191
30	375
23	401
29	393
29	394
23	401
32	366
23	401
35	183

Judgment was rendered for intervenors, from which defendants appeal; and plaintiffs appeal from the judgment and an order denying a new trial. Reversed.

STATEMENT OF THE CASE.

On September 17, 1892, the defendants filed their application in the United States land office for a patent to the Ramsdell lode mining claim. After notice was published, and within the time prescribed by law, the plaintiffs, Murray et al., filed their adverse claim in the land office, and began this suit. The plaintiffs base their claim upon a prior location, described as the "Maud S. Lode Mining Claim," alleging ownership and right of possession, and ouster by defendants. The defendants join issue upon these averments, and then set up affirmatively that they were in possession of the ground in controversy long before plaintiffs made any claim thereto, and that, if plaintiffs ever made a location thereon, they had forfeited all right thereto by failure to do the annual representation work for the years 1887 and 1888. Plaintiffs, in their replication, admit that they did no representation work upon the Maud S. claim for the years 1887 and 1888, but allege that they made a final entry of the land embraced therein in the land office on December 29, 1887, and obtained a receiver's receipt therefor showing that they were entitled to a patent. The defendants' location was made on January 1, 1888. The location of the Maud S. claim was made by one of the plaintiffs and others on May 28, 1881. Both claims cover the same ground. A trial of the cause was had in the district court, and resulted in a judgment in favor of plaintiffs. Upon appeal to this Court the judgment was reversed, and a new trial ordered (17 Mont. 455, 43 Pac. 505), for error by the trial court in excluding from the evidence decisions of the local land office, the commissioner of the land office at Washington, and the secretary of the interior, offered by the defendants, canceling and setting aside the receiver's receipt held by plaintiffs. The final decision of the secretary of the interior was rendered June 1, 1892. Before the second trial was had

in the district court, Walter W. Adams, Henry Muntzer, William Burton, Eduard Wegner and Charles Colbert made an application to the court for leave to intervene in the cause, claiming the ground in controversy, as against both plaintiffs and defendants, under a location of the same made by themselves on January 31, 1894, as the "Adverse Lode Mining Claim." They allege in their complaint in intervention that the plaintiffs had lost whatever right they acquired under the Maud S. location by failure on their part to do any representation work on the claim for the years from 1888 to 1893, inclusive, or to resume work thereon before January 31, 1894, the date of completion of the Adverse location. They also allege failure on the part of the plaintiffs to claim their rights by filing affidavit of claim under act of congress approved November 3, 1893. As against defendants, they allege that the receiver's receipt outstanding in the hands of plaintiffs on January 1, 1888, had withdrawn the land from the public domain; that it was not open to exploration and location by any one at that time; and that therefore defendants acquired no right to it by virtue of the Ramsdell location. Judgment is demanded that they be declared the owners and entitled to the possession of the ground as against both plaintiffs and defendants. The complaint was allowed to be filed over the objection of the plaintiffs and defendants, who preserved their exceptions.

At the trial the plaintiffs introduced in evidence the facts of their location, their location notice, and the receiver's receipt, and thereupon rested. The defendants introduced the records of the United States land office, showing the cancellation of this receipt, and then offered proof of their location, and notice recorded in pursuance thereof. Upon objection of all the other parties, this evidence was excluded, and thereafter the defendants took no further part in the trial than to enter their objections and preserve their exceptions. Plaintiffs and intervenors concluded their proofs, and the jury rendered a verdict for the intervenors. Judgment was accordingly entered in their favor under the prayer of their complaint. Plaintiffs

moved for a new trial, which was denied. Defendants have appealed from the judgment. Plaintiffs have appealed from the judgment and the order denying a new trial. The appeals were filed under separate numbers, but were heard and are decided together.

Mr. George Haldorn and Mr. John W. Cotter, for Plaintiffs and Appellants.

A location to be effectual must be good at the time it is made. The subsequent abandonment or forfeiture of the ground included therein would not inure to the benefit of the subsequent locator. (1 Lindley on Mines, Sec. 363; *Belt v. Meagher*, 3 Montana, 65, 104 U. S. 279, 285.) So long as an entry remains uncanceled, the land is withdrawn from the public domain, and no valid location can be made thereon. (*Whitney v. Taylor*, 158 U. S. 85 L. E. 906-908; *Sanders v. N. P. R. R.* 166 U. S. 616 L. E. 1139; *Belk v. Meagher*, 104 U. S. 279, L. E. 735; *Witherspoon v. Duncan*, 71 U. S. 210, L. E. 339; *H. & D. Ry. Co. v. Whitney*, 132 U. S. 357, L. E. 363; 1 Lindley on Mines, Sec. 363; Clark's Mineral Law Dig., page 239; *Nelson v. Big Blackfoot Mill Company*, 17 Mont. 553; *Newhall v. Sanger*, 97 U. S. 761; *DeLacey v. Northern Pac. R. Co.*, 72 Fed. 726; *Southern Pac. R. Co. v. Brown*, 75 Fed. 85, and numerous cases cited in opinion on page 90.)

The receiver's receipt issued to plaintiffs, having withdrawn the ground included therein from the public domain, as we submit, defendants' location was invalid and void at the time it was made, and hence they took no rights thereunder, and were not in a position to maintain an invalid location as against either the plaintiffs or intervenors in this action. It is contended by the defendants in this action that the plaintiffs cannot take advantage of an invalid entry, and that to permit them to do so in this case would be to permit them to take advantage of their own wrong. In this connection, in addition to the authorities cited in intervenors' brief on this point,

we call the attention of the Court to: *Whitney v. Taylor*, 158 U. S., pages 90-91; *Southern Pac. Ry. Co. v. Brown*, 75 Fed. page 90.

Messrs. Forbis & Forbis and *Mr. F. T. McBride*, for Defendants and Appellants.

Mr. W. I. Lippincott and *Mr. Wm. H. De Witt*, for Interveners and Respondents.

a. A final receipt obtained from the land office even by fraud is valid *prima facie*, and is voidable only and not void.

b. A final receipt obtained from the land office, even if afterwards proved to be fraudulent, while it is outstanding the land is not relocatable.

The final receipt was voidable and not void. The rules as to void and voidable judgments we think apply to this final receipt, for a final receipt is in the nature of a judgment. It is the final determination of a competent tribunal, to wit, the land office, upon a matter within its jurisdiction. It determined the rights of the parties upon a full hearing, and the subsequent issuance of a patent upon such receipt, if it should be issued, was formal. The United States simply retained the legal title to be transferred in the course of the business of the land office. It is perfectly clear that this judgment, to wit, the final receipt, was not void. It is equally clear that it was voidable because it was obtained by fraud. (Freeman on Judgments, Sec. 117.) The distinction between a void and voidable judgment is made clear in *Harvey v. Whitlatch*, 2 Mont. 55, and *Edgerton v. Edgerton*, 12 Mont. page 147. The judgment in question, to wit, the final receipt, was absolutely valid on its face. The only way by which it could be attacked was in an action brought for that purpose and by showing facts *aliunde* the record of the judgment. Let one examine the final receipt and the whole record in the land office by which it was obtained and nothing whatever could appear in the least suspicious. It was only when, by a proper proceeding, the facts of fraud in obtaining the receipt ap-

peared, that the receipt was set aside. Certainly no fraud appeared upon the record in the land office, for if it did the land office would not have issued the receipt. We may therefore declare that the final receipt was valid until it was attacked. It had not been attacked when the defendants located their Ramsdell claim. It was therefore then valid. Suppose, for example, that the final receipt was uncanceled on the day when this case was tried. Certainly it could not have been attacked on that trial for fraud. The final receipt when it was issued conclusively proved the regularity of all proceedings which led up to its issuance. (*McDonald v. Edwards*, 44 Cal. 380; *Witcher v. Conklin*, 84 Cal. 500.) It was conclusive until set aside in a direct proceeding for that purpose. Indeed that principle was announced on the former appeal in this case, 17 Mont. 460, where the Court says: "If this (final receipt) were unattacked it concluded the defendants."

"b" A final receipt, even if it be obtained by fraud, and even if it be afterward canceled for fraud, withdraws the land from the public domain, and while it is outstanding the land cannot be located by another. *Nelson v. Big Blackfoot Milling Company*, 17 Mont. 553, is in point. In deciding the Nelson case this Court relied upon *Whitney v. Taylor*, 158 U. S. 85. The question had frequently been before the Supreme Court of the United States, and in this case the Court reviewed many of the decisions. We will not cite those decisions, but will refer the Court to them as quoted in the Whitney case. We submit that this case is exactly in point, and is conclusive, for the reason that the Court holds that the land is withdrawn from the public domain by an entry, even if that entry is afterwards canceled for actual fraud. No case could be more clearly in point. On the same principle, we also refer the Court, without citing, to *Northern Pacific Railroad Company v. Sanders*, 166 U. S. 620; *Barden v. Northern Pacific Railroad Co.*, 154 U. S. 288. The leading and distinguished case of *Belk v. Meagher*, 104 U. S. 279, is also entirely in point. The same principle is held in the decisions of the land office. In *Smuggler Mining Company v. True*

Worthy Lode, 19 L. D. 356, it is held that "an adverse location made during the pendency of an order holding an original claim for cancellation gives the original locator no standing to be heard as against the right of a claimant." If such relocater may not be heard as against the right of the claimant, then *a fortiori*, he may not be heard as against the right of a third party against whom no charges of fraud can be made; and again, *a fortiori*, if a relocation cannot be made during the pendency of an order holding the original claim for cancellation, it certainly cannot be made when, as in the case at bar, there is not even any action pending in the land office looking to the cancellation of the final receipt. See, also, *American Hill Quartz Mine*, 5 C. L. O. 114. We have not these Land Office Decisions at hand and quote only from the syllabi in the digest. See, also, *Rose v. Richmond Mining Company*, 17 Nev. 25; Lindley on Mines, Sec. 363 and cases cited; *Worth v. Branson*, 98 U. S. 118.

A final receipt is equivalent to patent as to third parties. (*Aurora Hill Con. Min. Co. v. 85 Min. Co.*, 34 Fed. 515; Lindley on Mines, Secs. 771, 773, 208.) We have endeavored to show that the final receipt itself, as well as a patent, withdraws the land from the public domain, and therefore the land is not locatable while the final receipt is outstanding. (*Taylor v. Whitney* and other cases above cited.) This principle, we believe, is firmly established. Then to that proposition we add the principle that the final receipt is equivalent to a patent, and therefore we may apply all the presumptions of fact and law attending the patent to the final receipt. Certainly it can never be contended that while a United States patent is outstanding upon a piece of land, the same could be located by another claimant. (Lindley on Mines, Sec. 777.)

Of course it is true that the patent may be impeached collaterally on the ground that there was no jurisdiction to issue it; and this brings us back to the principle heretofore discussed that a void patent or final receipt may be attacked collaterally. But it cannot be contended that this final receipt

is void. This matter is discussed hereinbefore. If a patent or final receipt cannot be attacked collaterally when the question arises collaterally in a lawsuit, then, *a fortiori*, it can not be attacked by a simple location notice filed upon the ground covered by the patent or a final receipt. Without further citations we submit to the Court the whole discussion of this subject by Judge Lindley and the authorities cited by him and also the authorities mentioned in the cases which we have cited. We believe that these citations cover the whole case and make it apparent that the premises were not open to location at the time when the defendants filed their notice of the Ramsdell claim, and that therefore the Ramsdell location was absolutely void.

The court did not err in allowing us to intervene. We believe it to be true, as we have heretofore stated, that this is a statutory action. That is to say, the statutes of the United States provide that an appropriate action shall be brought to determine a fact, and that fact is whether the plaintiff as an adverse claimant in the land office, or the defendant as an applicant for patent, or neither, is entitled to proceed for patent in the United States land office. (*Wulff v. Manuel*, 9 Mont. 276.) Plaintiffs and defendants each here claim that we have no right to come into this court as intervenors because we had not filed an adverse claim to the application by defendant for patent. Ejectment was the remedy chosen by the plaintiffs as an appropriate one. An allegation of the filing of an adverse claim in the land office would certainly not be an allegation germane to the subject of ejectment. This Court seems to have held in *Mattingly v. Lewisohn*, 8 Mont. 263, that a plaintiff who is a land office adverse claimant must allege in the state court the filing of an adverse claim in the land office, but let it be remembered that the question in that case was only as to a plaintiff as an adverse claimant. But concede to the plaintiffs and defendants in this case the very most that they may claim under the *Mattingly-Lewisohn* case, still the later case of *Hoffman v. Beecher*, 12 Mont. 498, is adverse to their contention; according to this decision, it seems that even

a plaintiff need not make an allegation of having filed an adverse claim. If not a plaintiff, then certainly not an intervenor, whose rights have been initiated since the time for filing adverse claims has expired. The case of *Altoona Q. M. Co. v. Integral Q. M. Co.*, 114 Cal. 100, treats of this subject very fully.

Section 1322 Code of Civil Procedure does not forbid our intervention. We submit that this section should be construed under the rule that, "In construing a statute we should observe the old law, the mischief and the remedy." For many years in this territory these suits were brought either in the form of ejectment or to quiet title. In many cases there never had been an actual ejectment and for this reason facts could not be proved to bring the case within the technical rules of ejectment. On the other hand if the party desiring to bring the action was not in possession he therefore would fail in an action to quiet title. Just such a difficulty arose in *Wolverton v. Nichols*, 5 Mont. 89. The same difficulty will be found in many of the older Montana cases. It was generally found that two different parties had located the same piece of ground. Neither ever retained any *pedis possessio*. They simply went upon the ground and made the locations and left the premises. There were thus many cases where technically neither ejectment nor an action to quiet title would prevail. We submit that section 1322 was intended to meet this class of cases and to provide that possession was not a material element in the case. Furthermore the statute does not require that application for patent must have been made and an adverse claim filed. The statute simply provides that if these facts do appear they are sufficient to give jurisdiction. But in this case it does appear that an application has been made and an adverse claim filed; that is to say, the application by the defendant, and an adverse claim by the plaintiff. Thus jurisdiction has been acquired over the premises and over the subject of the right to the land. The case is properly in court where a defendant and plaintiff occupy the position of applicant and adverse

claimant. Therefore the case being in court, we contend that the court may adjudicate everything connected with the controversy, and that a part of the controversy is that another party, to-wit: The intervenors are entitled to the land. Even if it be held that the plaintiff must allege that he has filed an adverse claim in the land office, still we contend that the Act of Congress of March 3, 1881, confers upon the intervenors the right to come into this action. There are three results which may be reached. The verdict may be either in favor of plaintiff or defendant or neither of them. This latter question is material in the case. The intervenors' contention here is that neither plaintiff or defendant is entitled to the premises, because in fact intervenors own it. Thus in addition to our contending for our own rights we are in effect a friend of the Court and a friend of the United States land office.

The great contention of the plaintiffs and defendants against us is that we should have filed an adverse claim in the land office. In this connection it is pertinent to consider who may be adverse claimants within the provisions of Sections 2325 and 2326 U. S. R. S. Adverse claimants certainly are those having adverse claims at the time of the sixty days' publication of notice. No other person could file adverse claims during the period of publication. We are not adverse claimants. Our rights accrued in 1894, which was some years later than the publication. We submit that *Enterprise M. Co. v. Rico-Aspen Con. M. Co.*, 161 U. S. 108, sustains our contention that it is not material to our right of intervention that we did not file an adverse claim in the land office. Section 2325, R. S. U. S., after providing for an application for patent and the 60 days' publication of notice, states, "and thereafter no objection from third parties to the issuance of a patent shall be heard except it be shown that the applicant had failed to comply with the terms of this chapter." But we sought to prove, and did prove to the satisfaction of the lower court, that the applicants had failed to comply with the terms of the chapter, and that they had totally failed to make any valid location of the ground.

Under the views expressed by Justice Miller (*Rose v. Richmond Min. Co.*, quoted in *Hoffman v. Beecher*, 12 Mont. 498) we submit that we have a right in this case before we were foreclosed or embarrassed by the issuance of a patent to one of the other claimants. If this case had been allowed to go on in our absence and it had been decided that plaintiffs could not take advantage of their own wrong, as above discussed, and that defendants were entitled to proceed to patent, the intervenors would certainly have been seriously embarrassed and put to great expense and trouble in establishing their rights in the United States land office.

Turning to our statute upon intervention, we find that it provides, Section 598, C. C. P.: "Any person may, before the trial, intervene in an action or proceeding who has an interest in the matter in litigation, in the success of either of the parties or against both." We submit that we have a vital interest in the matter of this litigation and in the success of either of the parties, and that we have an interest against both. Applying Mr. Pomeroy's language (Code Remedies, Sec. 430), we submit that we are the only ones entitled to relief, that is to say, entitled to this land. Again we submit that if the original action had never been commenced, and that if we, as sole plaintiffs, had brought this action of ejectment, we would have been entitled to a judgment against the defendants. (*Altoona Q. M. Co. v. Integral Q. M. Co.*, 114 Cal. 100.) To state the whole matter shortly, the intervenors found these two parties contending for a piece of land which belonged to the intervenors. They therefore come in to establish their rights as against both parties.

Again it is stated in Section 429 of Pomeroy that the interest of the intervenor "must be in the matter in litigation and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment." Certainly we gain by the effect of the judgment rendered in our favor because it establishes our rights as against both plaintiff and defendants. And we would lose by the effect of the judgment if it were in favor of either

plaintiffs or defendants, in that at least we would be obliged to resort to tedious and lengthy proceedings to establish our title. As the judgment now stands the whole contention is settled, and if either plaintiffs or defendants undertake to apply for patent and we adverse them, or if we apply for patent and either plaintiffs or defendants adverse us, we would have this present judgment to plead as *res adjudicata*, for the reason that it would be the same contention between the parties. Again Mr. Pomeroy says, Section 423, Code Remedies: "In order that a person may avail himself of the permission given by the statute to intervene and may make himself a party to an action he need not be a necessary party." Even if we are not a necessary party here, we are a proper one, and our presence in this case concludes the whole controversy. Again Mr. Pomeroy says in the same section: "The ground of such an application (intervention) lies in the discretion of the court." We submit that in this case a wise discretion was exercised, a discretion which achieved the result of the maxim, "*interest reipublicae ut finis litium sit.*"

MR. CHIEF JUSTICE BRANTLY, after stating the case, delivered the opinion of the Court.

The records of the United States land department, introduced by defendants, show that the entry of the ground in controversy by the plaintiffs on December 29, 1887, was cancelled for fraud, upon the protest of some of the defendants and the predecessors of the others. The fraud alleged and established was that plaintiffs had represented to the register and receiver that they had done sufficient work upon the claim to entitle them to a patent, whereas they had not done more than one-half that amount. From these facts and the foregoing statement it will be seen that the parties, respectively, occupy these positions: The plaintiffs contend that, by their entry and the receipt issued to them, the land was withdrawn from the public domain, so that the defendants could acquire no rights by their location on January 1, 1888, notwithstanding no work was done by plaintiffs for the previous year, and

the entry was subsequently cancelled for fraud. This withdrawal, they say, was effective to protect them against a location by any one else until the receipt was finally cancelled on June 1, 1892, and that when this occurred they could resume work, and thus retain their original right. The defendants insist that, as the entry was void, because fraudulently made, the plaintiffs were not, even during the existence of the receipt, excused from doing the necessary work to prevent a forfeiture, and that a cancellation of the entry inured to their benefit, so as to give them a valid claim to the ground under their location. The intervenors support the contention of the plaintiffs against the claim of the defendants, but maintain that their claim is good as against plaintiffs, because of a forfeiture incurred by plaintiffs in 1893. The trial court sustained the contention of the plaintiffs as against defendants, thus excluding defendants from the case, leaving only the question of the forfeiture of 1893 to be tried between the plaintiffs and the intervenors. Both plaintiffs and defendants contend that the intervenors have no rights in this case. These contentions require the solution of two questions: (1) Did the court err in permitting the intervention? (2) Assuming the defendants location to be otherwise valid, did they acquire any right thereunder by virtue of the cancellation of plaintiffs' entry?

1. We are of the opinion that the trial court erred in permitting the intervention. Actions of this kind are brought under Section 2326 of the Revised Statutes of the United States, and the Act of Congress of March 3, 1881, amendatory thereof. The form of the action and the mode of procedure are regulated by the same rules and controlled by the same statutes that apply to ordinary actions in the state courts. (*Wolverton v. Nichols*, 5 Mont. 89, 2 Pac. 308; *Milligan v. Savery*, 6 Mont. 130, 9 Pac. 894; *420 Min. Co. v. Bullion Min. Co.*, 9 Nev. 240); but the ultimate question to be determined is, which of the parties is entitled to a patent? The action may be in ejectment, or a suit to quiet title, according to the position of the parties at the time suit is

brought; but the ultimate purpose of the suit must be kept constantly in view, so that the judgment may be so framed as to accomplish that purpose. *Wolverton v. Nichols, supra*, was reviewed by the Supreme Court of the United States. (119 U. S. 485, 7 Supreme Court 289, 30 L. Ed. 474.) That court, conceding the right to the territorial court to try the case under the statutes of the territory applicable to the form of action therein adopted, reversed the judgment of the trial court on the ground that it misinterpreted the facts proved by the plaintiffs in support of their case. In speaking of the purpose of the action, however, the court said: "The proceedings in this case commenced by the assertion of the defendants' claim to have a patent issue to them for the land in controversy. The next step was the filing of an adverse claim by the plaintiffs in the land office, and the present suit is but a continuation of those proceedings, prescribed by the laws of the United States, to have a determination of the question as to which of the contesting parties is entitled to the patent. The act of congress requires that the certified copy of the judgment of the court shall be filed in the land office, and shall be there conclusive. And we must keep this main purpose of the action in view in any decision made with regard to the rights of the parties." In *Garfield Mining Co. v. Hammer*, 6 Mont. 53, 8 Pac. 153, Mr. Justice Galbraith, for the court, said: "Now, although the courts of this territory, in determining the title to mining claims where there is a dispute in relation thereto in the land office, have adopted the forms of action by which title to land is tried, which may be either by the action of ejectment or to quiet title, yet the real question to be determined is, who is entitled to the patent from the United States government to the mining claim in controversy; or, in other words, who has become the purchaser of the mining claim, and divested the title of the government thereto, by complying with the requirements of the law of congress relative to acquiring title to mineral lands?" Again, this court, in *Hoffman v. Beecher*, 12 Mont. 489, 31 Pac. 92, after quoting the foregoing language with

approval, said: "An analysis of the issues in the case at bar demonstrates the purposes for which the parties are engaged in this litigation, and that the adverse claim is the foundation of the action, and that appropriate relief will be granted upon the ultimate facts." In keeping with this view of the ultimate purpose to be accomplished, it has grown to be the inveterate practice in this jurisdiction to require the pleadings in such cases to contain allegations showing that the court has jurisdiction to proceed with the case, and so enabling it intelligently to reach a determination of the question at issue. Accordingly, in *Mattingly v. Lewisohn*, 8 Mont. 259, 19 Pac. 310, it was held by this Court that a complaint in an action to establish an adverse claim for a patent was fatally defective, in that it failed to allege that plaintiff had filed his adverse claim in the land office within the 60 days allowed by section 2326, *supra*, and that the suit was brought within 30 days thereafter. The allegations were held to be necessary, because the plaintiff must prove these facts in order to have any standing in Court. If he must prove them, he must necessarily allege them. Doubtless if the complaint contained allegations sufficient in other respects, the court would judicially know whether the suit were brought within 30 days after the filing of the adverse claim; but, in any event, the fact must appear from the face of the record. And this is not an unreasonable or unnecessary requirement, because its observance prevents conflict of action between the state court and the officers of the land department, and enables the court to know whether its judgment thus sought, often through tedious and expensive litigation, will, in the end, be effective for any purpose; for, if the suit is not instituted within the statutory time, the officers of the land department cannot give the judgment any effect whatever, even if it be against the applicant for patent. The rule of *Mattingly v. Lewisohn* has been uniformly observed in this state, as an examination of the original records in *Wulf v. Manuel*, 9 Mont. 279, 23 Pac. 723, *Hoffman v. Beecher*, *supra*, and other cases will show. In *McKay v. McDougal*, 19 Mont. 488, 48 Pac. 988, it was ex-

pressly approved. The rule also finds expression in Section 1322 of the Code of Civil Procedure of 1895; for it is there provided that "it is sufficient to confer jurisdiction upon the court, if it appears from the pleadings that the application for a patent has been made, and an adverse claim thereto filed and allowed in the proper land office." Whether the form of action is changed in other respects by this provision or not, it seems clear that the provision itself is, in the particular here considered, a statutory declaration of the rule always observed by this Court.

If it is necessary that these allegations be made in the pleadings, then no one who cannot make them (that is, no one who has not filed his adverse claim under the statute) has any right to maintain a suit against the applicant, and thus delay the issuance of the patent. It is only by virtue of their compliance with the law in this particular that the plaintiffs have obtained standing in Court; but that they did so, and have thus delayed the issuance of patent until long after the time for filing adverse claims has expired, is no reason why the intervenors should be permitted to interfere and litigate their claims with the parties.

Counsel for the intervenors cite Section 589 of the Code of Civil Procedure, which provides: "Any person may, before the trial, intervene in an action or proceeding who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both." They also cite a part of section 430 of Mr. Pomeroy's Code Remedies, construing the foregoing provision, viz.: "The intervenor's interest must be such that if the original action had never been commenced, and he had first brought it as the sole plaintiff, he would have been entitled to recover in his own name to the extent at least of a part of the relief sought; or, if the action had first been brought against him as the defendant, he would have been able to defeat the recovery in part at least." They insist that they have an interest adverse to both parties herein, and that under this provision of the statute, as interpreted by Mr. Pomeroy, they should be allowed to liti-

gate their rights in this case. But, under the rule of pleading heretofore seen to be applicable to suits of this character, they do not and cannot make the allegations or the proof necessary to give them any standing in court whatever. If they have any right to the ground in controversy, they cannot enforce it through the medium of an intervention in this action, but must be relegated to the land office, where they may be permitted to show that the parties who may succeed herein have not complied with the law. (Lindley on Mines, Sec. 758; *Mt. Blanc Con. G. Mining Co. v. Debour*, 61 Cal. 364.) The principle of the case last cited we think the correct one, notwithstanding an intimation to the contrary in *Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co.*, 114 Cal. 100, 45 Pac. 1047. Counsel also cite *Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.*, 167 U. S. 108, 17 Sup. Ct. 762, 42 L. Ed. 96, as conclusive upon the point that the filing of an adverse claim was not necessary to give them the right of intervention. The case is not in point. It involved a controversy between the patentee of a mining claim and the owner of a tunnel site as the ownership of veins intersecting the line of the tunnel. The mining claim was the junior location, and was parallel with the course of the tunnel. At the time patent for the mining claim was applied for, it was not apparent that it covered any lead that would be cut by the tunnel. No adverse claim was made by the tunnel site owner. Subsequently it developed that the claim interfered with the tunnel site owner's rights. Under these circumstances, it was held that the tunnel site owner lost no rights by failing to file an adverse claim, because the conflict was not then known, and that his rights were superior to the rights under the junior claim.

2. The answer to the second question will be reached when we have determined what obligation, if any, rested upon plaintiffs to do the representation work during the year 1887. Were they relieved from the necessity of doing it by the receipt obtained by fraudulent representations to the authorities of the land office? The contention of the plaintiffs is that they

were. They proceed upon the assumption that after the officers of the land department have examined into the application for a patent, have determined that the applicant is entitled to purchase, have accepted his money in payment for the land and issued to him a certificate of purchase, he is vested with the full equitable title thereto. The land is then withdrawn from the mass of the public lands, and, no matter what infirmity may inhere in the proceedings by which he obtained his certificate, no one else can acquire any right to the land, as against him, so long as he holds the certificate. A fraudulent certificate, they say, is just as effective to preserve their rights as an honest one.

There is no doubt that when the entryman has complied with the law in good faith, and has been recognized by the government as a purchaser, he is regarded, as to third persons and the government, the equitable owner of the land. As such, he is liable to pay taxes on it, the same as upon his other property. (*Carroll v. Safford*, 3 How. 441, 11 L. Ed. 671; *Witherspoon v. Duncan*, 4 Wall. 210, 18 L. Ed. 839.) He is to be treated as the owner. In *Witherspoon v. Duncan*, after asserting the power of congress to dispose of the public land either by sale or donation, the court proceeds: "In either case, when the entry is made and the certificate given, the particular land is segregated from the mass of the public lands, and becomes private property. In the one case the entry is complete when the money is paid; in the other, when the required proofs are furnished. In neither can the patent be withheld, if the original entry was lawful." The effect of an entry of public land has also often been considered in the construction of grants by the United States in aid of railroads, where the grant contains a reservation or exception in favor of homestead, pre-emption, or other claims which had attached before the definite location of the line or route of the road. It has always been held by the federal courts, except as hereafter noted, that, as the grant becomes effective only upon the definite location of the line of the road, all claims which have attached to lands within the limits of the grant prior to that

time, whether valid or not, come within the exception, and are reserved from the operation of the grant. (*Hastings & Dakota Railroad Co. v. Whitney*, 132 U. S. 357, 10 Supreme Court 112, 33 L. Ed. 363; *Kansas Pacific Railway Co. v. Dunmeyer*, 113 U. S. 629, 5 Supreme Court 566, 28 L. Ed. 1112; *Whitney v. Taylor*, 158 U. S. 85, 15 Supreme Court 796, 39 L. Ed. 906; *N. P. Railroad Co. v. Sanders*, 166 U. S. 620, 17 Supreme Court 671, 41 L. Ed. 1139; *So. Pac. Railroad Co. v. Brown*, 21 C. C. A. 236, 75 Fed. 85.) The later case of *N. P. Railroad Co. v. De Lacey*, 174 U. S. 622, 19 Supreme Court 791, 43 L. Ed. 1111, however, modifies the rule of the earlier cases cited, so that the exception is held not to apply to pre-emption claims where the claimant has failed to make final proof and payment within the time provided by law. Such claims, though of record in the land office, are held to have been forfeited by operation of law. As to other classes of claims, the rule appears to remain unchanged. Counsel for plaintiffs cite these cases, and *Carroll v. Safford*, and *Witherspoon v. Duncan*, *supra*, as conclusive of their contention. We do not think they are. The cases of *Carroll v. Safford*, and *Witherspoon v. Duncan*, proceed upon the obvious principle that one who has purchased lands in good faith from the government, and holds the evidence of his purchase, is, as to the government and third persons, the equitable owner of them; and that he cannot avoid his duty to the state simply because he has not been vested with the legal title. The rule would be the same, however, if his title were fraudulent. So long as he stands as the apparent owner claiming the land, the obligation is the same. But his duty to the state, under such circumstances, would not prevent the government, or perhaps a person standing in its place, from avoiding his claim by showing it to be fraudulent and unfounded. The plaintiffs in this case were doubtless liable to pay taxes upon the Maud S. claim so long as they remained the apparent owners of it, though it be conceded that they had no title whatever. In our opinion, there is also a clear distinction to be drawn between the relative positions and

rights of the parties in this case, and those of the parties in controversies arising out of the construction of railroad grants. A grant of this kind is a specific grant *in præsentia*, vesting and becoming certain upon the definite location of the line of the road. When the line becomes fixed, the corporation is vested with title to all the designated lands within its limits, other than those expressly excepted or reserved. These exceptions are specifically mentioned, including, among others enumerated, those to which "the right of pre-emption or homestead settlement has attached," or those not "free from pre-emption or other claims or rights," and are held to be excluded from the operation of the grant by the very fact of their existence at the time the grant attaches, without regard to whether they are fraudulent or otherwise, unless forfeited by operation of law. (*Northern Pac. Railroad Co. v. Majors*, 5 Mont. 111, 2 Pac. 322; *Northern Pac. Railroad Co. v. Lilly*, 6 Mont. 65, 9 Pac. 116; *U. S. v. Northern Pac. Railroad Co.*, 6 Mont. 351, 12 Pac. 769; and also cases in last citation.) It was not contemplated by congress at the time the grant was made that, in every instance where a claim had attached to land within the limits of the grant, the settler or other claimant should be put to the trouble or expense of showing his good faith or the validity of his claim, as against the railroad company. (*Kansas Pac. Railway Co. v. Dunmeyer*, and *Hastings & Dakota Railroad Co. v. Whitney*, *supra*.) These questions were left to be adjusted between the government and the claimants. The claims came within the exceptions expressly enumerated, and were therefore excluded from the operation of the grant. On the other hand, the parties plaintiff and defendant in this case stand as two rival purchasers, each claiming to be entitled to the land in question. The latter have confessedly acted in good faith in the performance of the required conditions; while the former, though admitting their fraud, nevertheless insist that, because they thereby induced the government to make them the apparent purchasers, they are excused from the performance of these conditions. Though they were detected in their

fraud, and the government declared them without title, this fact, they say, did not affect their right to claim the land under the receipt while they held it, and thus to exclude others from acquiring any right thereto.

It is conceded on both sides that when a locator, having complied with the law, in good faith completes his proof and pays the purchase money, his equitable title is complete. The conditions are then all performed, and no further obligation rests upon the applicant to expend money in doing the annual representation work. Even if the patent is delayed for any reason, still when it is finally issued it is evidence of the regularity of all previous acts, and relates back to the date of the original entry, so as to cut off intervening rights. Indeed, the decisions are uniform on this question wherever it has been considered. (*Deno v. Griffin*, 20 Nev. 249, 20 Pac. 308; *Aurora Hill Consol. Min. Co. v. 85 Min. Co.*, (C. C.) 34 Fed. 515; *Benson Mining & Smelting Co. v. Alta Mining & Smelting Co.*, 145 U. S. 428, 12 Supreme Court 877, 37 L. Ed. 762; *Barringer & Adams Law of Mines & Mining* 265; *In re Harrison*, 2 Land Dec. Dep. Int. 767.) But we have not been able to find any adjudicated case upon the exact question presented here. Counsel have cited none, and we therefore conclude that there is none. This fact, however, is to be noted: That in all the cases cited, except those arising out of railroad grants, the presumption has obtained that the entry in question was made in good faith, and in each one of them the entry was a subsisting one at the time the controversy arose. Counsel for defendants have cited *U. S. v. Steenerson*, 1 C. C. A. 552, 50 Fed. 504. In that case one Hanson had made a pre-emption entry upon public land, and on November 1, 1884, made his final proof, and received a certificate of purchase. He at once conveyed the land to Steenerson, one of the defendants. During the winter of 1885-6 the firm with which Steenerson was associated cut from the land 754,000 feet of logs, and had them in their possession. In April, 1886, the United States brought suit in replevin to recover the logs, claiming that the title to the land, and there-

fore to the timber, had not vested under the entry, on account of fraud practiced by Hanson in making it. During the pendency of the suit, and before the trial, the entry was cancelled by the commissioner of the land office on the ground that the entry was not made in good faith for actual settlement, but for the purpose of enabling Steenerson and his associates to strip the land of the timber thereon. The circuit court of appeals sustained the action. We quote from the opinion by Judge Shiras: "The final certificate or receipt acknowledging payment in full, and signed by the officers of the local land office, is not in terms, nor in legal effect, a conveyance of the land. It is merely evidence on behalf of the party to whom it is issued. In a contest involving the title to land, wherein a person claims adversely to the United States, it is open to such claimant, notwithstanding the legal title remains in the United States, to prove that, by performance on his part of the requisite acts, he has become the equitable owner of the land, and that the United States holds the legal title in trust for him; but as the claimant in such case has not received a patent or formal conveyance, and has not become possessed of the legal title, he is required to show performance, on his part, of the acts which, when done, entitle him, under the law, to demand a patent of the land. When evidence of this kind is offered on behalf of the claimant, it is open to the United States to meet it by proof of any fact or facts which, if established, will show that the claimant has not become the real owner of the realty. If it be true, in a given case, that the entry of the land was not made in good faith, but in fraud of the law, certainly it cannot be said that the claimant has become the equitable owner of the land, and that the United States is merely a trustee holding the legal title for his benefit. Fraud vitiates any transaction based thereon, and will destroy any asserted title to property, no matter in what form the evidence of such title may exist." The case is not in point upon the question here considered, but it is suggestive, in that the court emphasizes the necessity resting upon the entryman to perform in good faith all the conditions required

by law before he makes the entry. These are conditions precedent, and without the performance of them in good faith no title vests. The cancellation of plaintiffs' receipt adjudicated the fact that they obtained no title at all by their entry. By this judgment of the authorities of the land office they were deprived of the ability to claim any rights under it. They were left with just such rights as they had at the time they obtained it. If they chose to rely upon it as evidence of their title, and then forbore to preserve their rights by doing the acts necessary to preserve them, they are not now in a position to assert that they have lost nothing. They stand in the same position as they would have stood on January 1, 1888, if they had not obtained the receipt at all. They cannot be heard to say that during the time the receipt was outstanding the land was withdrawn from the mass of public lands, and that defendants acquired no rights under their location. Plaintiffs' rights were forfeited, and the Maud S. claim was subject to relocation at the time the Ramsdell claim was located. To hold otherwise would be to lend assistance to the fraud attempted by plaintiffs, and which would have been successful but for its exposure made by defendants and their predecessors. It would permit them to profit by their own misconduct, in violation of the principle expressed in the wholesome maxim, "*Nemo allegans suam turpitudinem est audiendus.*" We are not to be understood as holding that the plaintiffs have no rights in any event. We speak upon the facts in the record before us.

The trial court refused to permit the defendants to introduce the notice of location, and the facts upon which it was based, on the ground that there had been no forfeiture of the Maud S. claim. This was error. If upon another trial, however, it should appear that the acts done by the defendants on January 1, 1888, did not amount to a valid location, they would be in no position to take advantage of plaintiffs' forfeiture, and plaintiffs would be entitled to a judgment against them.

Nor are we to be understood as dissenting from the rule of

the cases cited in the former part of this opinion, touching the force and effect of a certificate of purchase from the United States. The language used in those cases is very broad and sweeping, but is applicable only to the facts of those particular cases. Such a receipt is not open to collateral attack in the courts in controversies arising between rival claimants to lands covered by them. This case is an exceptional one, and is decided upon its own peculiar facts, under the principles applicable to them.

While we feel satisfied to rest our decision upon the reasons already given, there is another question involved which requires a brief notice. The opinion rendered on the former appeal in this case concludes thus: "We are therefore of opinion that the certified copies of the register and receiver, the commissioner of the general land office, and the secretary of the interior should have been admitted in evidence. It was error to exclude them, either for the reasons expressed by the court, or those argued by counsel. These documents were material to defendants' case. Plaintiffs had proved a receiver's receipt for the land in controversy. If this were unattacked, it concluded the defendants. To avoid this result, it was material to defendants to show that this receiver's receipt did not exist, and that it, with its force and power, had been destroyed by the cancellation of the same by the officers of the land department having jurisdiction over that subject." This conclusion states the decision of this Court of the only question determined. The sole purpose for which the evidence is competent is to establish the fact that plaintiffs forfeited their rights on January 1, 1888. It thus opens the way for defendants to introduce the proof of their location. That decision was therefore a determination, indirectly, that the Maud S. claim was forfeited by the failure of plaintiffs to represent their claim in 1887. It is, therefore, the law of this case, and binding on us. (*Daniels v. Andes Insurance Co.*, 2 Mont. 500; *Palmer v. Murray*, 8 Mont. 174, 19 Pac. 553; *Kelley v. Cable Co.*, 8 Mont. 440, 20 Pac. 669; *Davenport v. Kleinschmidt*, 8 Mont. 467; *Maddox v. Teague*,

18 Mont. 512, 46 Pac. 535; *Priest v. Eide*, 19 Mont. 53, 47 Pac. 206, 958.)

The judgment herein in favor of the intervenors against the plaintiffs and defendants, and the order denying plaintiffs' motion for a new trial, are reversed, and the cause is remanded, with directions to the district court to grant a new trial. It is further ordered that the defendants recover of the plaintiffs and intervenors all costs incident to defendants' appeal herein, each being liable as against the other for one-half thereof, and that the plaintiffs recover of the intervenors all costs incurred both upon their motion for a new trial and upon their appeal.

Reversed and remanded.

NOYES ET AL., APPELLANTS, v. ROSS ET AL.,
RESPONDENTS.

[No, 1,158.]

[Submitted October 18, 1899. Decided December 18, 1899.]

23	425
428	572

Chattel Mortgages—Fraud—Possession—Relationship of Parties—Trial—Findings—Evidence—Partnership Property—Assignment—Intention—Title—Liens.

1. Defendants, after contracting a debt to plaintiffs, executed a chattel mortgage to a third party on all their property, consisting of a stock of goods, the consideration for which was a previous loan, with which the mortgagors had purchased part of the goods. A further consideration were certain debts assumed by the mortgagee. The value of the goods was only a reasonable security for this combined debt. The mortgagors were to remain in possession, and sell at retail in the usual way of business for cash, or on not to exceed 30 days' credit, and to account to the mortgagee for the proceeds of the sales, and one of them was to be allowed to retain living expenses from the proceeds. The balance, after deduction of costs, was to go to the mortgagee. The mortgagee, in fear of losing the security, made a sale of the property by public auction prior to the maturity of the debt. Held, that the transactions were not in fraud of creditors.
2. A chattel mortgage otherwise valid is not fraudulent because of relationship between the mortgagee and one of the mortgagors.
3. The principle that the assets of a partnership are for distribution to their creditors does not obtain without regard to rights already existing.
4. The right to have partnership property first applied to partnership debts is one primarily for the benefit of the partners, and if they waive such right, firm creditors cannot invoke it to secure preferences over mortgage creditors.

5. The fact that a chattel mortgagor in possession is allowed to draw \$100 per month from the proceeds of sales, is not of itself conclusive of fraud.
6. Where the trial court found the issues generally in favor of defendant, and there was evidence to justify the finding, it will not be disturbed on appeal.
7. Where defendants gave a mortgage on all their property, which consisted of a stock of goods, they retaining possession and intending to continue the business, and having given the mortgage as a lien only, without intention to convey title or right to immediate possession, such mortgage will not operate as an assignment in favor of the mortgagee as a creditor.
8. A chattel mortgage which authorizes the mortgagor to retain possession, with the right to sell the stock of goods mortgaged in the ordinary and usual course of trade, if otherwise good, is valid, provided it appears therein that such sales are to be for the benefit of the mortgagee, and the mortgagor is to account to the mortgagee for the proceeds of the sales.
9. The question of the good faith of a chattel mortgage transaction is not to be decided as one entirely of law, but is largely one of fact.
10. A chattel mortgage is not on its face invalid because it authorizes one of the mortgagors in possession to retain his actual and necessary living expenses out of the proceeds of the mortgaged personalty.
11. A provision in a chattel mortgage giving authority to a mortgagor in possession "to sell at retail to regular and other customers in the usual and general way of business for cash, or on not to exceed 30 days' credit to responsible parties," does not, *per se*, render the mortgage void,—where the mortgage provides for accurate accounts of all sales, and that collections and deposits be applied towards the payment of the debt, less necessary and actual expenses of conducting the business.
12. An unauthorized sale of mortgaged property by the mortgagee before maturity of the mortgage debt, the mortgage being valid, and the mortgagor acquiescing in the sale, is not invalid as to creditors who had no lien on the property.

Appeal from District Court, Yellowstone County; George R. Millburn, Judge.

ACTION by Daniel R. Noyes and others against A. E. Ross and another. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

STATEMENT OF THE CASE.

The plaintiffs, Daniel R. Noyes et al., brought this action against A. E. Ross and A. A. Fenske, co-partners under the firm name of A. E. Ross & Co., and L. H. Fenske, defendants, in aid of supplemental proceedings to have declared void a chattel mortgage executed and delivered by A. E. Ross and A. A. Fenske, under the firm name of A. E. Ross & Co., to L. H. Fenske, and to have the said L. H. Fenske account to the plaintiffs for certain property of the said firm of Ross & Co. alleged to have come into his hands under the said mortgage.

It is alleged in the complaint that on July 9, 1895, plaintiffs obtained a judgment against the said defendants A. E. Ross and A. A. Fenske, partners as aforesaid, for the sum of \$1,985.45, together with interest; that execution was issued on said judgment on July 10, 1895, but that the same was returned unsatisfied; that thereafter, in November, 1895, proceedings were had supplementary to execution, and an order made on November 18, 1895, authorizing plaintiffs to bring an action against the defendants herein to determine the validity of the mortgage heretofore referred to; that the defendants, Ross & Co., prior to February 16, 1895, and subsequent to the contracting of the indebtedness upon which the judgment of the plaintiffs was recovered, owned a certain stock of drugs and fixtures, contained in their drug store, in the city of Billings, and that the said stock and fixtures were then of the value of about \$7,000. It is further averred that on February 16, 1895, the firm of Ross & Co. fraudulently, and for the purpose of hindering, delaying, and defrauding their creditors, made and delivered, or pretended to make and deliver, to the defendant, L. H. Fenske, a certain chattel mortgage, covering all of the stock of drugs, etc., in the said store of the said firm; but that the said chattel mortgage was without any valuable consideration and was fraudulent and void, and made with the intent to hinder, delay, and defraud creditors of said firm, and especially these plaintiffs; and that the said defendant, L. H. Fenske, for the sole purpose of helping the said firm and the partners thereof in their scheme to hinder, delay, and defraud the creditors of the firm, took the property described in the mortgage at the said time and at all times since, and still does claim and pretend to be the holder thereof by virtue of said chattel mortgage.

The mortgage contains the usual formal recitals included in chattel mortgages under the laws of Montana, and, in addition thereto, covers all the shelving, show cases, drugs, medicines, wines, liquors, etc., contained in the drug store of the plaintiffs, and is broad enough in its terms to cover all the goods and chattels used in connection with the said drug business,

and all stocks that might have been subsequently put into the said store to keep up the said business. The mortgage was given to secure the payment of a promissory note for \$4,500, dated at Billings, February 16, 1895, and due on or before one year after date, by A. E. Ross and A. A. Fenske to L. H. Fenske. It was provided in the mortgage that, in case default was made in the payment of the principal or interest, the mortgagee or the sheriff was empowered to sell the goods and chattels as prescribed by the terms of the mortgage, and out of the money arising from such sale to retain the principal and interest, and the overplus, if any there should be, was to be paid on demand to the said parties of the first part, that is, the firm of Ross & Co. It was also provided that, in case the power of sale should be executed, such sale should be advertised for five days, and might be either public or private. Furthermore, the mortgage permitted the mortgagors to remain in possession of the property, and to sell the goods described in the mortgage, until default; but provided that if, prior to the maturity of the indebtedness of the firm, the property, or any part thereof, was attached or claimed by any other person, or if at any time the mortgagee should consider the possession of said property, or any part thereof, essential to the security of the payment of the mortgagor's note or to the preservation of said property, then the mortgagee or the sheriff should have the right to immediately take possession of the said property, and the whole or any part thereof, and should have the right, at his option, to take possession from any person having or claiming the same, with or without suit or process, and for that purpose might enter upon the premises where the property might be found. The mortgage also included the following provisions:

“It is further expressly provided and agreed by and between the parties to this mortgage that the parties of the first part (Ross & Co.) may, and they are hereby authorized to, sell from said stock of drugs and goods, wares and merchandise, and from other goods hereafter added thereto, at retail, to the regular and other customers in the usual and general

way of business, for cash, or on not to exceed thirty days' credit to responsible parties; but the parties of the first part shall keep accurate account of all such sales, and during banking hours of each day deposit the proceeds of such sales in bank to the credit of the party of the second part, to apply on said note, retaining in the said store only sufficient of such proceeds to pay current bills and expenses of carrying on said business, and for making change.

"And it is further agreed that the parties of the first part will at least once a month, to wit, on or before the tenth day of each month, during the continuance of this mortgage, or the extension thereof, account to the party of the second part (L. H. Fenske) for all sales and collections made during the previous month, and pay over to the party of the second part at such times of accounting the proceeds of all such sales and collections, to apply towards the payment of said promissory note, after deducting the actual and necessary expenses of carrying on said drug business, and the actual and necessary living expenses of the said A. E. Ross, one of the parties of the first part, and after deducting enough to pay bills falling due for goods purchased to replenish said stock under the permission hereinafter granted.

"And it is further agreed that the said parties of the first part may from time to time purchase new goods, wares and merchandise for cash, or its equivalent, to replenish and keep up said stock of goods now on hand, and all such goods, wares and merchandise so purchased shall be considered as covered by this mortgage from and after their arrival in the said city of Billings, before they are placed in the said store as well as after; and, whenever the word 'store' is used in this mortgage, it shall be construed and understood to mean the front or sales room and the rear room or ware room of said store, and also the basement situate under said store."

The defendants by answer admitted the facts pleaded in relation to the judgment obtained against the firm of Ross & Co., but denied that the stock of goods and fixtures were of the value of \$7,000, or of any greater value than \$4,000.

They admitted the execution of the chattel mortgage, but denied all allegations of fraud, and averred that the said chattel mortgage was executed and delivered and accepted in good faith, and to secure a *bona fide* indebtedness, as set forth in the mortgage and the answer. They affirmatively alleged that on and before February 16, 1895, defendant A. A. Fenske was indebted to the defendant L. H. Fenske in the sum of \$1,110 and interest, which sum had been advanced before that time by said L. H. Fenske to A. A. Fenske, and had been used by the latter in the purchase of an interest in the drug business of A. E. Ross & Co. It was alleged that L. H. Fenske at the time of the execution and delivery of the mortgage was a stockholder in the Yellowstone National Bank of Billings, and that on said February 16, 1895, A. E. Ross and A. A. Fenske were indebted to said bank in the sum of \$2,150, with interest, and said bank being desirous of having said indebtedness secured, and the said Ross and Fenske desiring to secure the payment thereof, it was agreed between said Ross and A. A. Fenske, the said bank, and the said L. H. Fenske that the said L. H. Fenske should become responsible to the Yellowstone National Bank for the payment of said indebtedness, and that the same should be secured by the firm of Ross & Co. by giving the chattel mortgage described in this suit to the said L. H. Fenske, and that the amount due the bank, together with certain other debts of said firm, might be included in the said mortgage, and a note made by the members of said firm to L. H. Fenske, including the money due the bank and the indebtedness of \$1,110 to L. H. Fenske, and the further sum of \$1,000 due by the said Ross and Fenske to H. T. Ramsey of Billings, for part of the purchase price of the drugs and the drug business; that it was agreed that, for the purpose of assisting the firm of Ross & Co. in the continuance of their business, the said L. H. Fenske should assume, and that he did assume, and did agree with Ross & Co. and the bank and the said Ramsey to pay, the aforesaid debts of Ross & Co. to the said respective parties; and that pursuant to said agreement, L. H. Fenske did from time to time make pay-

ments on the said debts of Ross & Co. to the bank, and paid all the money due to the bank, excepting the sum of \$750, which remained unpaid at the time of the filing of the answer, and that L. H. Fenske had entirely discharged the debt due by the said firm to Ramsey. It was also alleged that when the mortgage was given there were some bills for goods that had been ordered by the firm of Ross & Co., amounting to about \$298, which the said L. H. Fenske agreed to pay, and that said sum was included in, and was part of, the consideration of the \$4,500 note described in the mortgage, and which said bills L. H. Fenske paid in full before the commencement of this suit. It was further alleged that the mortgage was made in good faith, and for the better security of the payment of the debts of said A. E. Ross and A. A. Fenske to the bank, and to indemnify the said L. H. Fenske against loss by reason of his having assumed and agreed to pay the various sums of money as heretofore described, and which he had paid in good faith, and for the further purpose of enabling the said Ross & Co. to continue their business. It was then set forth that Ross & Co. continued the drug business according to the terms of the mortgage until June 24, 1895, when the defendant L. H. Fenske, the mortgagee, feeling and deeming himself insecure, and that the possession of the property was essential to his security, took possession of the property described in the mortgage, under the terms thereof, and retained the said property in his hands, selling therefrom at private sale in the usual course of business, but in his name as mortgagee, until November 20, 1895, when, as mortgagee, after having given due notice pursuant to the provisions of the chattel mortgage, he sold the property remaining at public auction, and that he, the said L. H. Fenske, bought the same in for \$1,600, that being the best and highest bid made; that the said sum of \$1,600, together with \$55, the sum bid for the book accounts, was the reasonable value of said property; that after he took possession under the mortgage, and after paying the actual expenses of conducting the business, all the receipts were applied towards the liquidation of the

debt secured by the mortgage; that after properly applying the receipts of all kinds to the payment of the mortgage debt, less the expenses of foreclosure, sale and retention, and after applying the proceeds of the sales turned over by Ross & Co. between the time of the giving of the mortgage and the time that the mortgagee took possession, there was a balance still due on the mortgage of \$2,506, no part of which had been paid when the answer was filed; and that thereafter, on December 10, 1895, the said L. H. Fenske sold all the property that had been bought in by him for \$1,600, which sum, he alleged, was the reasonable value thereof.

The questions of fact involved were tried by a jury, who returned a general verdict and special issues for the plaintiffs. The special issues submitted directly involved the question of the good faith of Ross & Co. at the time of the execution of the chattel mortgage. The jury found that they intended to hinder, delay and defraud their creditors. Thereafter the defendants moved to set aside the findings of the jury. The court sustained this motion, for the reason that the findings and the verdict were contrary to the law and the evidence, and found the issues generally in favor of the defendants and against the plaintiffs, and gave the defendants judgment for costs. From this judgment, plaintiffs appeal.

Messrs. Cullen, Day & Cullen, and Mr. J. A. Savage, for Appellants.

The mortgage was void as a matter of law for the reason that it provides for a sale by the mortgagors on credit. The mortgage is in fact an assignment for the benefit of some of the creditors of the assignors. It segregated for the purpose of paying this indebtedness all of the property of the debtors, not to hold as security, but to sell and out of the proceeds to pay the indebtedness. Its very terms preclude the idea of security, in this, that all the proceeds from day to day, after applying enough to cover expenses, were to be deposited in bank to the credit of the mortgagee. If the mortgage of a stock of goods which permits the mortgagor to continue pos-

session and sell in the ordinary course of trade is to be upheld at all, it is only on the theory that the mortgagor becomes the agent of the mortgagee for the purpose of selling and accounting for the proceeds of sale. (*Rocheleau v. Boyle*, 11 Mont. 457.) The court will look through forms and arrive at the substance of the transaction and if, from an examination thus made, it appears that the essential characteristics of an assignment are present it is immaterial what the parties may term the instrument. (*Marshall v. Livingston Nat. Bank*, 11 Mont. 351.) If then this instrument is to be governed by the rules relating to assignments for benefit of creditors, the court should have held it void because of the provisions relating to sales on credit. (*Rosenstein v. Coleman*, 18 Mont. 459.) In the case at bar the questions were submitted to the jury and by them answered affirmatively to the effect that there existed a fraudulent intent in the execution of the instrument in controversy. This finding should not be set aside by either the trial or the appellate court, if there is substantial evidence to support it. (*Merchants' Nat'l Bank v. Greenhood*, 16 Mont. 395.) The mortgagee took possession of the property of the mortgagors June 24th, 1895. The mortgage gave him no power of sale of it prior to the maturity of the indebtedness and, if it did, it did not authorize him to sell it other than at public auction. Yet we find him selling in the ordinary course of business, paying operating expenses, replenishing stock and treating the stock of goods and the store in all respects as if it were his own. These acts amount to a conversion and render him liable to these plaintiffs for the value of the property at the time he took it, viz: June 24th, 1895. (*Haesler v. Hosp.* (Wis.) 34 N. W. 145; *Lininger v. Heron* (Neb.) 36 *id.* 481; *Loeb v. Milner*, 32 *id.* 205; *Lomax v. Walk* (Ore.) 54 Pac. 199.)

Mr. O. F. Goddard, for Respondents.

MR. JUSTICE HUNT, after stating the case, delivered the opinion of the Court.

The contention of appellants is that the mortgage was void because it contained a provision for the use and benefit of the mortgagors, by providing that out of the proceeds of the sales of the property covered by the mortgage the mortgagors were permitted to retain the necessary living expenses of one of them, and because it was provided that the mortgagors might sell the mortgaged property at retail, in the usual and general way of business, for cash, or on not to exceed thirty days' credit to responsible parties. We glean from the record the following facts, which should be considered in the determination of the questions presented by the applicants:

1. A. E. Ross and A. A. Fenske formed their partnership to enter into the drug business in June, 1894. At the time they started they borrowed some money from the Yellowstone National Bank, and bought a stock of drugs from one H. T. Ramsey, paying him \$1,500 in money, and giving him notes for the balance due him. They afterwards added to the stock of goods bought from Ramsey by purchases from wholesale drug houses. On February 16, 1895, an inventory was taken, and the chattel mortgage referred to in the statement of facts preceding this opinion was given to L. H. Fenske for the purpose of securing what they owed to Fenske, to the bank, to Ramsey and other parties. The firm ran the business until June 24, 1895, purchasing goods from time to time with money taken in by them in their store. The mortgagor Ross drew out from the proceeds of the sales of goods about \$100 a month for his living expenses. A. A. Fenske, the other partner and mortgagor, took no part in the conduct of the business, which never seems to have been profitable, owing to heavy expenses. On June 24, 1895, the mortgagee took possession, which was voluntarily surrendered to him by the mortgagors. At the time the mortgagee took possession the mortgagors were being pressed for payment by certain of their creditors, but the evidence is that the mortgage was executed to secure the notes which were assumed by the mortgagee, L. H. Fenske. The mortgagee testified that he saw that the business was not paying anything, and he asked the

mortgagors for a chattel mortgage, and took the mortgage to indemnify himself for moneys which he agreed to pay to the bank, and which were due by the firm, and for money due to Ramsey, and for the sum of \$1,100 due by one of the partners to Ramsey. He said that he understood that an attachment was about to be served upon the property of the mortgagors, and in pursuance of advice by counsel he immediately took possession under the terms of his mortgage, put one Hill in charge of the store and continued to run the business for a time. The expenses were so heavy, however, that he concluded to sell it all off. While he was running the business he sold in the usual course of trade, and finally closed the whole stock out at auction on November 24, 1895, and bought it in himself for \$1,600. This sale was at public auction, and numerous persons were present, including a representative of these plaintiffs. Some sales on credit had been made while the mortgagors were in charge, and before the mortgagee took possession, but about 90 per cent. of the sums charged had been collected before this suit was commenced. At the time of the execution of the mortgage in February, 1895, an inventory was taken and the goods and fixtures valued at \$6,620.92, the stock itself being put at a little over \$5,000. From the time of the execution of the mortgage, in February, and up to the time of taking possession by the mortgagee, in June, 1895, the firm's receipts were \$3,054.90. Of this sum \$1,144.05 was deposited in bank. The firm also purchased \$1,635.33 worth of merchandise during that time. The total credit sales for that time were \$860.05. The mortgagor Ross drew out \$385.35. The expenses (rent, clerk hire, etc.) amounted to \$1,525.50. When the mortgagee took possession another inventory was taken, whereat the stock was valued at \$3,872.52 and the fixtures at \$900. From the time of the execution of the mortgage until the mortgagee took possession, monthly reports of the business were made to the mortgagee, and the \$1,144.05 deposited in the bank by the firm was put to the credit of L. H. Fenske, the mortgagee, under the terms of the mortgage, and from such deposits

there were paid considerable sums due for goods, by checks drawn by the mortgagee. When the inventory was made at the time the mortgagee took possession, it was computed upon the basis that if a man could be found who desired to go into the drug business in Billings, and invest in a drug store, and keep up the business, and was willing to pay for the good will and other appurtenances of such a business, the prices were fair and reasonable. The values were with relation to the wholesale price list plus the freight. It appears by a statement in the record that the mortgagee, from the time he took possession of the property, deposited in bank the sum of \$1,518.55; and a recapitulation showing cash receipts since the execution of the mortgage disclosed that \$7,125.01 had been received in that time, out of which there had been paid for merchandise and expenses the sum of \$6,353.75, which with the sum of \$27.78, representing a loan and cash balance in bank, left a balance of \$743.48 to be applied to the mortgage debt. We notice that included in the expenses from the time the mortgagee took possession, in June, to November, 1895, he paid to Ross, the mortgagor, the sum of \$515.35 for living expenses. The management of the store was in Mr. Hill, who had been a clerk in the employ of the mortgagors, Ross & Co. The purchaser, after the auction sale, testified that at the time he purchased the goods he thought they were worth about 50 cents on the dollar of the invoice, and that he believed he paid a fair market price for them in November, when he bought.

We believe that, upon consideration of all this evidence, the court was justified in finding no actual and intentional fraud on the part of the mortgagors and the mortgagee. The fact that a relationship existed between one of the mortgagors and the mortgagee cannot invalidate the mortgage. If the debt was one honestly due, the mortgagors had a right to secure it, whether due to a relation or any one else, even though their action left nothing for their other creditors, provided, always, the transaction was in good faith, and entered into with honest intention. As evidence of fraud, and of an

intent to hinder and delay creditors, plaintiffs also mention the fact that part of the amount included in the partners' note to Fenske was an individual indebtedness of \$1,100 due by one of the partners. This statement is correct, as the testimony shows that \$1,100 was loaned by the mortgagee to one of the mortgagors, who used the money borrowed to buy an interest in the new drug firm of Ross & Co. at the time that the partnership between Ross and Fenske was formed. But the mortgagee took the note of the co-partners and the mortgage by the firm in good faith and for value. When the partners executed the mortgage, they had full possession of the property,—no lien had attached to it, and, both partners consenting, their right to mortgage the stock in good faith can not be denied. The principle that the assets of a partnership are for distribution to their creditors does not obtain, without regard to rights already existing. Again, the right to have partnership property first applied to partnership debts is one primarily for the benefit of the partners, and, if they waive such right, firm creditors cannot invoke it to secure preferences over mortgage creditors. These rules rest upon the principle that the right of creditors of a partnership to have partnership debts paid out of partnership property before the debts of an individual partner is not a lien or trust, but is a derivative equity from the partner, and can be made effective only through the equity of an individual partner, to which the creditor is subrogated. It follows that, if such partner is in no position to enforce it, a firm creditor cannot. "So, if, before the interposition of the court is asked, the property has ceased to belong to the partnership,—if by a *bona fide* transfer it has become the several property either of one partner or of a third person,—the equities of the partners are extinguished, and consequently the derivative equities of the creditors are at an end. It is therefore always essential to any preferential right of the creditors that there shall be property owned by the partnership when the claim for preference is sought to be enforced." *Case v. Beauregard*, 99 U. S. 119, 25 L. Ed. 370. (See, also, *Reynolds v. Johnson*, 54 Ark.

449, 16 S. W. 124; *Purple v. Farrington*, 119 Ind. 164, 21 N. E. 543, 4 L. R. A. 535; *Smith v. Smith*, 87 Iowa 93, 54 N. W. 73; *In re Estate of Edwards & Wigginton*, 122 Mo. 426, 25 S. W. 904, 29 L. R. A. 681.)

2. The additional fact that the mortgagor was allowed to draw \$100 per month from the date of the mortgage until the sale of the property by the mortgagee at auction is not of itself, or in connection with the other facts in evidence, conclusive of fraud. If the mortgagor was employed by the mortgagee after the latter took possession, he was entitled to compensation; if he was not, but was allowed to receive money, it was evidence tending to establish a fraudulent intent on the part of the parties to the mortgage. But, as the district court has found the issues generally in favor of defendants, and there is evidence sufficient to justify the action of the court, we cannot now set aside the conclusions of the district court, as unwarranted by the evidence. The finding by the judge that the whole transaction was entered into in good faith, and for the purpose of securing defendant L. H. Fenske and certain creditors whose debts were evidenced by the note for \$4,500 made by the mortgagors at the time of the execution of the mortgage, is supported (*Haggin v. Saile*, 23 Mont. 375, 59 Pac. 154); and we shall therefore pass to the question of whether or not, as a matter of law, the mortgage was invalid, and operated as a fraud against the creditors of the mortgagors. To that we briefly address ourselves.

Involved in this inquiry is the assertion of appellants that the instrument under consideration is, in effect, an assignment for the benefit of the creditors of Ross & Co., and should be so regarded. The facts, however, will not bear out this statement, for they go to prove that Ross & Co. intended to keep up their business, if they could, and that they merely gave the mortgage to secure Fenske for a debt due to him, and to indemnify him for coming to their relief when other creditors were demanding immediate payment, and threatening to attach their property. As far as we can gather from the evidence in support of the court's finding, they had no intent to

devest themselves of title and all control of their stock of goods by conveying the same to a trustee for the purpose of securing a distribution of its proceeds among a portion of their creditors, which would have made the instrument, in legal effect, an assignment for the benefit of their creditors, as was held in *Marshall v. Livingston Bank*, 11 Mont. 351, 28 Pac. 312. Here we find the mortgagors retained possession, and intended to only give a lien on their property, preserving their equities as mortgagors, while in that case the mortgagor intended to make an absolute appropriation of property to his creditors by authorizing immediate possession, passing both the legal and equitable title absolutely beyond his control to the mortgagee, which was to sell, collect the proceeds, pay expenses, pay certain notes, and then account for any balance to the debtor.

The fact that a mortgage upon all of a debtor's property operates to secure certain creditors does not of itself make the security an assignment, where the written contract and the acts thereunder show an intention to give a security only, although it becomes the duty of courts to examine into the circumstances of such transfers very carefully, lest a transaction be given an effect in express contradiction of the intention of the parties to it. Tested by these principles, we conclude that *Ross & Co.* mortgaged their stock to *Fenske*, and that the law of chattel mortgages and not that of assignments for the benefit of creditors must be applied to the contract in question.

3. A mortgage which authorizes the mortgagor to retain possession, with the right to sell a stock of goods mortgaged, in the ordinary and usual course of trade, if otherwise good, is on its face a valid instrument, provided it appears therein that such sales are to be for the benefit of the mortgagee, and he is to account to the mortgagee for the proceeds of the sales. To this extent the courts and text writers have advanced in later years. We must remember that, as a substitute for possession in the mortgagee, the mortgage must be filed in the office of the county clerk. Secrecy is thus obviated, and opportunity to perpetrate fraud is greatly lessened.

The records are public, and creditors are thereby constructively advised of the nature and provisions of the mortgage—they have a knowledge that the mortgagor has given a lien upon his stock of goods, and of the provisions of the contract granting the lien. It is the policy of the recording acts that has outweighed the policy of an older rule, under which, upon the theory of constructive fraud, mortgages with power to sell the mortgaged goods in the usual course of trade were so often held void.

Mortgages of stocks in trade, with right to sell, cannot be said by judges to be the result of fraudulent intentions on the part of the parties to them, unless such intentions existed in fact; on the contrary, as Justice Brewer said of such transactions in *Etheridge v. Sperry*, 139 U. S. 266, 11 Supreme Court 565, 35 L. Ed. 171, the supreme court could not “be blind to the fact that the tendency of this commercial age is towards increased facilities in the transfer of property, and to uphold such transfers so far as they are made in good faith.” In our opinion, where the law requires the filing of a chattel mortgage with the county clerk, as it does in Montana, in cases where the mortgage provides that the property may remain in the possession of the mortgagor (Compiled Statutes 1887, Fifth Division, Sec. 1540; Civil Code, Sec. 3864), and where “any interest in personal property which is capable of being transferred may be mortgaged,” which was the law generally before the Codes were adopted, as it is now (Civil Code, Sec. 3860), the records give the requisite information to persons dealing with mortgagors, and contracts by way of security upon a stock of goods, with power to sell, under an agreement to apply the avails of sales to the payment of the mortgage debt, should be upheld, as promoting, rather than retarding, business arrangements, for they are not only compatible with perfect honesty, but suffer many a business to be kept up which would otherwise fail, and afford many a debtor an opportunity to gain a solid foothold in a community where he might otherwise go to the wall. “It is to be observed,” say the supreme court of Vermont in *Peabody v.*

Landon, 61 Vt. 318, 17 Atl. 781, "that the mortgagee in such a case places the avails of the sale wholly within the power of the mortgagor, and must trust him, to a greater or less extent, to pay them over on the debt secured. Yet, with the general power of sale, the parties, when the mortgage is made honestly, intend the property conditionally conveyed as security for the payment of the debt; and use it for that purpose. There is no question in regard to the validity of such mortgages between the parties. It is contended that they should not be held fraudulent *per se* and void, because such mortgages furnish a convenient opportunity to cover the property away from the other creditors for the benefit of the mortgagor, when they may be honestly intended and used to secure the payment of the mortgagor's debt in the most economical, and in such an inexpensive manner as to save something for the other creditors, or at least for the mortgagor. It seems to us that, so far as controlled by public policy, the question is for the legislature rather than for the court, and that the fundamental error of Mr. Pierce, and the authorities which hold such mortgages fraudulent *per se* and void, lies in assuming that the question is to be determined by the principles of the common law as propounded in *Twyne's Case*, rather than by a fair construction of the provisions of the statute, and of public policy as indicated by the provisions of the statute."

Jones on Chattel Mortgages, Section 381, regards such mortgages as valid, and rests his text upon the principle that the statutes authorizing chattel mortgages where the mortgagor retains possession would fail of their purpose in respect to an important class of property,—merchandise held in stock and for sale,—if the doctrine of constructive fraud must obtain, and render such instrument void on their face. The authorities for the more modern rule impress us as sound in their reasoning, and we hold that the question of the good faith of a mortgage transaction like the one before us is, on principle, not to be decided as one entirely of law, but is largely one of fact, and must be ruled upon accordingly. (*Etheridge v. Sperry*, *supra*.)

Leopold v. Silverman, 7 Mont. 266, 16 Pac. 580, decided by the territorial Supreme Court, followed the supposed doctrine of *Robinson v. Elliott*, 22 Wall. 512, 22 L. Ed. 758; but since those two decisions the Supreme Court of the United States, in *People's Savings Bank v. Bates*, 120 U. S. 556, 7 Supreme Court 679, 30 L. Ed. 754, and *Etheridge v. Sperry*, already cited, has declined to accede to the doctrine of the case of *Robinson v. Elliott*, *supra*, as interpreted in *Leopold v. Silverman*, *supra*, while this Court has likewise modified, if it has not drawn away from, the views expressed in *Leopold v. Silverman*, by already putting itself in accord with the better rule. (*Rocheleau v. Boyle*, 11 Mont. 451, 28 Pac. 872; *Heilbronner v. Lloyd*, 17 Mont. 299, 42 Pac. 853.)

4. Nor is the mortgage on its face invalid because it authorized one of the mortgagors to retain his necessary living expenses; for if there be no fraud in law by necessary implication from the mortgage of the stock in trade with power to sell to pay the debt due the mortgagee, and account for the sales to him, or generally from a chattel mortgage of all the goods of a merchant, with such powers and agreements contained within it, it is difficult to see how an agreement which allows the mortgagor to draw out enough for his subsistence necessarily has the effect to hinder, delay or defraud creditors and is a fraud upon them. It certainly is competent evidence to be considered in the determination of the question of the good faith of the parties to the mortgage, but if the whole transaction is honest, and has been entered into in good faith by all parties to the mortgage, the only way by which, in most instances, the provisions agreed upon can be effectually carried out, and by which the stock can be sold, and the mortgagee paid, and the mortgagor's business still allowed to continue, is to permit the mortgagor to manage the stock with regard to the rights of the mortgagee, and to draw a living from the proceeds while he is doing so. Indeed, if he has no other property or independent means,—and a merchant who executes such a mortgage in good faith is usually wholly without ways of living, outside of the net proceeds of current

sales from his stock,—yet it is a fraud for him to draw out enough for him to live upon, such a mortgage is of no benefit to the mortgagor; for he simply cannot remain in possession to fulfill the agreement, if he can get nothing to live upon while performing the contract. Carried to its conclusion, it will readily be seen that, if such mortgages are to be held fraudulent on their faces because of such agreements, none may make them, except men of independent means or credit; but as we all know that such persons do not, as a rule, have to resort to these liens to protect their creditors, it is more just to establish principles which will give effect to such mortgages by consideration of that common knowledge which tells us that those who mortgage their stocks are too often without any other means at all, and yet by the law they have the power to mortgage whatever they have, in an honest effort to pay their debts without resort to assignment for the benefit of creditors. All such agreements, however, whether in parol or included in the mortgage itself, should be closely scrutinized, for they force the transaction involved close to the line where the law will say the parties have adopted a means whereby creditors are hindered and delayed; yet, notwithstanding all this, such mortgages are not necessarily of such a character that the law will conclusively imply fraud, if none actually exists, but will leave the question of good faith to be tried as one of fact. (*Frankhouser v. Ellett*, 22 Kan. 127.) In *Oliver v. Eaton*, 7 Mich. 107, a provision whereby the mortgagor was to apply the proceeds of sales in the purchase of other goods, keeping up the stock, “and in the support of his family,” and to pay a certain indebtedness, was held by Campbell, J., not to render the mortgage null and void, but that the intent was for the jury. (See, also, *Gay v. Bidwell*, 7 Mich. 519, and *Sperry v. Etheridge*, 63 Iowa 543, 19 N. W. 657.)

In the very recent case of *Williams v. Mitchell*, (Kan. App.) 58 Pac. 1025, the case of *Frankhouser v. Ellett*, 22 Kan. 127, *supra*, and *Whitson v. Griffiths*, 39 Kan. 211, 17 Pac. 801, are affirmed in the following language: “It is

further contended that the mortgage is void upon its face by reason of the following provision: 'It is agreed that said R. Allen Hall shall remain in possession of store, subject to the prior provisions of this mortgage, and, after expense of store and living are deducted, the balance of money shall apply on debts secured.' A chattel mortgage will not be declared void upon its face for the reason that the mortgagor retains possession of the stock, and is permitted to deduct his living expenses from the proceeds of the sales, 'but will be upheld or condemned according as the arrangement is entered into and carried out in good faith or not.''' We think, therefore, that on the face of the instrument this provision does not require the Court to treat it as fraudulent and void.

5. We disagree, too, with the contention that the authority 'to sell at retail to regular and other customers in the usual and general way of business for cash, or on not to exceed thirty days' credit to responsible parties,' *per se* renders the mortgage void. We would advise against a provision in a chattel mortgage allowing sales on credit, as its apparent tendency is to vest in the mortgagor a discretion in respect to his sales which may afford him an opportunity to collusively dispose of his stock with intent to delay and defraud unsecured creditors; but, while such a provision invites a challenge of the transaction involving it, on the other hand we are not prepared to say that a right to sell at retail only to customers in the usual and general way of business, for cash, or on credit of no more than 30 days, gives so great a latitude to the mortgagor that, as a matter of law, it destroys the security of the mortgage lien, and conclusively negatives all presumptions of good faith, and forbids any inferences other than those of a fraudulent intent. Having shown that mortgages upon stocks of goods, with power to sell therefrom in the usual course of business, are valid, it would seem to follow, where the mortgage may run for a year, that sales at retail (if the business is a retail one generally), for cash, or to *responsible* parties on a limited credit for 30 days, are not incompatible with the best of faith and perfect honesty, where

the mortgage provides for accurate accounts of all sales, and that collections and deposits be applied towards the payment of the debt, less necessary and actual current expenses of conducting and maintaining the business. The usual and general way of conducting a drug business in a small town is probably to sell in part on a 30-day credit to responsible people, so that authority to extend such a credit may be but an agreement that sales can be made in the usual and general way of business.

Sales and application of proceeds of sales are strictly within the intended purposes of chattel mortgages of the kind before us, and, so long as the parties to them keep within the bounds of the lawful operations of such mortgages, they have a right to insert any reasonable provisions consistent with the intention of applying the stock mortgaged to the liquidation of the debt secured by it. Now, under the stipulation of the mortgage by Ross & Co. to Fenske, the accounts of all sales were to be made monthly, and at the accounting the proceeds of all sales and collections, less expenses, etc., as hereinbefore considered, were to be applied to the payment of the note to Fenske. This stipulation imputes no fraud to either party, for, so long as it was complied with, the mortgage was having its desired and lawful effect, and Noyes Bros. & Cutler were not injured; nor were they hurt by an extension of a credit for thirty days, because, as against them, or any unsecured creditor in like position, all sales, whether cash or for credits, were to be accounted for; and we are of opinion credit sales should, as between mortgagors and mortgagee, all be deemed cash payments paid over to apply on the note of Ross & Co., although, as between Ross & Co. and Fenske, the credit may not have been collected, and may in fact have been unpaid at the time of the accounting. In *Brackett v. Harvey*, 91 N. Y. 214, an agreement was entered into between a mortgagor and mortgagee, wherein the mortgagee agreed, among other things to "take business notes running sixty and ninety days, to be indorsed by said Frank E. Darrow, and apply the same in pay-

ment of Darrow's said notes as they fall due." Thereafter a mortgage was executed pursuant to said contract, and, upon the question of the validity of the mortgage because of such an agreement, the court held that, under a stipulation allowing the mortgagor to sell the mortgaged property, but accounting to the mortgagee for the proceeds, and applying them to the mortgage debt, "the proceeds realized by the agent are to be deemed realized by the principal, and, as against an adverse lien, are to be applied on the mortgage debt, even though not actually paid over," and that under that doctrine it is impossible to impute fraud or injury to others in the agreement. The reasoning of the New York court appears to recognize an agency in the mortgagor who sells goods, whereby his act in selling for credit binds the mortgagee to treat the credit as if it were cash; and this way of looking at it finds support in *Conkling v. Shelley*, 28 N. Y. 360, *Miller v. Pancoast*, 29 N. J. Law, 250, and *Frankhouser v. Ellett*, *supra*, and other cases referred to hereafter. In the last case Judge Brewer, for the court, said that a mortgagor in possession, with authority to sell and apply the proceeds, acts in respect to the sales "as a *quasi* agent, at least, of the mortgagee." We do not regard him as an agent in fact, inasmuch as the mortgagor is the owner of the stock mortgaged at least until steps are taken to foreclose his rights, yet he is an owner under an agreement to sell for the benefit of the mortgagee, and to account, and to reserve nothing beyond what is actually necessary to be reserved to carry on the business and live upon; and in carrying out this agreement, so far as the rights of third persons who are creditors are concerned, he occupies a relationship towards the mortgagee which should be deemed to bind the mortgagee to the extent of requiring that all credit sales made pursuant to the authority of the mortgage should be treated as cash, and applied on the debt secured by the mortgage. To this extent we concur with Jones on Chattel Mortgages, Sec. 422, who says the mortgagor in such cases "may well enough be regarded as the agent of the mortgagee in making the sales and in receiving

the purchase price." In *People v. Bristol*, 35 Mich. 29, decided before the last Kansas case cited, the court decided that a chattel mortgagor is an owner, and could not be the agent of the mortgagee; but notwithstanding this reasoning, which we think is exact, in a sense, the case is cited to support the text of Mr. Jones, that the mortgagor may "well enough be regarded as the agent;" and, moreover, it was before the Supreme Court of Kansas, in *Frankhouser v. Ellett*, *supra*, where the mortgagor was characterized as a *quasi* agent, for Judge Brewer cited the opinion as an authority on another point, but referred to it as sustaining the doctrine of agency, as he applied it. It can be said, therefore, that, while the mortgagor is the owner, yet by virtue of the mortgage he has contracted in good faith to conduct his business and sell his stock to liquidate his mortgage debt; and in order to do this, and still avoid suspension, he has agreed to turn over all moneys to the mortgagee, only reserving necessary expenses, and that in executing this agreement he will act for the interests of the mortgagee, and, in a measure, in his direct behalf. A mortgagor intrusted with this authority must possess the confidence of the mortgagee, and it is because of this confidence that he is permitted to sell under agreement to turn over and account. His position is, therefore, in this sense, that of an agent of the mortgagee; while as to third persons, in respect to credits, he is to be held an agent. (*Gleason v. Wilson*, 48 Kan. 500, 29 Pac. 698; *Wilson v. Sullivan*, 58 N. H. 260; *Allen v. Goodnow*, 71 Me. 420; *Sawyer v. Long*, 86 Me. 541, 30 Atl. 111.)

Lane v. Starr, 1 S. D. 107, 45 N. W. 212, is an interesting case upon the point just considered. The sheriff there levied upon a stock of drugs and other goods under attachments and executions against one C. J. Lane, then personally in possession. Starr claimed ownership by virtue of a chattel mortgage executed by C. J. Lane to him, and brought action. The question considered was the validity of Starr's mortgage as against the creditors of Lane. The mortgage contained a clause authorizing C. J. Lane to remain in possession until

the mortgage debt was paid, "as agent of W. A. Lane," and required him to account to W. A. Lane, or his assigns, monthly, for all sales, until the debt was fully paid. There was a further clause in the mortgage whereby the parties stated their intention to be that "the sale of the property should be absolute to W. A. Lane until the debt was fully paid. the said C. J. Lane acting only as the agent of said W. A. Lane in disposing of the goods, * * * and accounting * * * until the indebtedness was paid." The court held that the provision was a valid one, and that the means employed and consented to were consistent with the trust created to effect a direct and convenient conversion of the mortgaged property into money to be applied on the debt. The court said this, also: "In this treatment of this case we have not forgotten the theory of our statute, that the title to mortgaged property remains in the mortgagor, nor have we overlooked the apparent difficulty of making the mortgagor, who still owns the goods, the agent of the mortgagee, who does not own them; but this relation of the parties to the title to the property cannot affect the principle involved in this discussion, nor require nor justify the application of a different rule for the discovery of the true character or effect of the agreement. The quality of the transaction, as fraudulent or otherwise, is determined from its effect, possible or probable, upon the interests of other creditors; and the effect of this agreement upon those interests would be precisely the same whether the title passed to the mortgagee, or whether it remained in the mortgagor. The presence or absence of vice in this agreement is tested by the inquiry whether the sales were to be made in the interest of the mortgagor, and the proceeds controlled by him, so that they might or might not be applied upon the mortgage debt, or whether they were to be made in strict and faithful execution of a real trust, so that every decrease of the security should work a corresponding reduction of the debt." (See, also, *Felner v. Wilson*, 55 Ark. 77, 17 S. W. 587; *Crow v. Red River Co. Bank*, 52 Tex. 362; *Pink v. Ehrman Bros.*, 44 Ark. 310, and *Adler & Bros. v. Claffin, Mellin & Co.*, 17 Iowa, 89.)

6. Appellants next argue that the court's decision in favor of the respondents is erroneous, because the mortgagee, after he took possession, sold the mortgaged property in the ordinary course of business, and disposed of the same at auction, prior to the maturity of the debt, and without authority contained in the mortgage to make any sale at such time. Let us grant that this is all true, and, even so, the plaintiffs are not in a position to complain. The mortgage being a valid security, and possession thereunder having been legally taken, and plaintiffs, as we have shown, having had no lien upon the stock of goods, and the mortgagors having acquiesced in the acts of the mortgagee, as firm creditors plaintiffs have not shown that they were injured by any acts of the mortgagee done to make his lien effective. The property turned out to be inadequate security for the debt due Fenske, but there having been no fraud or illegality in his acts by which plaintiffs were injured, and plaintiffs having shown no title or right of possession to the property, they are without cause of complaint against the defendants.

Finding no error in the record, the judgment must be affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY: I concur.

MR. JUSTICE PIGOTT: I am not entirely satisfied, upon the facts as they appear in this case, that the provision of the mortgage permitting the actual and necessary living expenses of one of the mortgagors to be paid out of the proceeds of the mortgaged personalty does not, of itself, invalidate the mortgage as to the plaintiffs; I am inclined to think, however, that the better reasoning supports the conclusion of the opinion, that such provision does not, *per se*, necessarily avoid the mortgage as to creditors, and I therefore concur. Upon the other points decided I concur also.

IN RE WELLCOME.

[No. 1,401.]

[Submitted December 11, 1899. Decided December 23, 1899.]

Attorney at Law — Bribery — Disbarment Proceedings — Trial — Failure of Accused to Testify — Presumption of Innocence — Reasonable Doubt — Witnesses — Impeachment — Evidence — Detective — Reputation of Accused — Acts Not Connected With Professional Conduct — Quantum of Proof.

1. A proceeding for disbarment is not a criminal prosecution, nor in aid of criminal investigation, and Penal Code, Section 2442, providing that the failure of the accused to testify in his own behalf shall not be used to his prejudice, has no application to such proceeding.
2. In disbarment proceedings, where the accused did not testify in his own behalf, the presumption of his innocence remains with him only until it appears to the court with reasonable certainty that he is guilty, and then it is incumbent upon him to speak.
3. The rule in criminal prosecutions that the guilt of the accused must be proved beyond a reasonable doubt does not apply to proceedings for disbarment.
4. The testimony of two witnesses to acts by the accused constituting bribery is not impeached by that of six witnesses from the localities where the two live, to the effect that they bear a bad reputation for truth, when the six are the political opponents of the two, and some of them had had personal differences with the two, and others testified that they had a good opinion of the two until they testified to the bribery.
5. The testimony of two credible witnesses to acts by the accused constituting bribery was a relation involving much detail and many incidents, and was given by both on three separate occasions without material variation, and was corroborated by the production by one of them of a large sum of money which they claimed to have received as a bribe from the accused, and the witness producing the money was a man of small means. The accused failed, without reason, to testify in his own behalf, and his attorneys answered on information and belief only. *Held*, there being no evidence to the contrary, that the evidence given was sufficient to establish the guilt of accused.
6. That the accused had always borne an excellent reputation for integrity is in his favor during trial, but is no defense to the crime if actually committed.
7. That the principal witness in disbarment proceedings against the accused was a brother lawyer, and secured his evidence in a reprehensible manner, by acting as detective, and apparently entering into a criminal plan with the accused, in order to expose him, does not, of itself, render his evidence unworthy of belief.
8. Under the Montana statute, offenses within the line of professional duties and those without these lines, stand upon the same footing so far as concerns the quantum of proof necessary to establish them.

ORIGINAL proceedings to disbar John B. Wellcome. Judgment of disbarment.

Mr. C. B. Nolan, Amicus Curiae.

Mr. Wm. Wallace, Jr., Messrs. Carpenter & Carpenter, Mr. F. E. Corbett, Mr. Jesse B. Roote, and Messrs. Cullen, Day & Cullen, for the Accused.

PER CURIAM.—In the written accusation filed in this proceeding are contained specific charges of bribery, and also of conspiracy to bribe and to corruptly influence the official action of members of the Sixth Legislative Assembly in the election of a United States senator. Some of the charges are upon knowledge, and others upon information and belief. Questions arising out of objections to the form and substance of the charges were considered and determined in the former opinions of this Court, reported in 23 Mont. 140, 213, 58 Pac. 45, 47. Of the charges of bribery, four are upon the knowledge of the accuser, and specifically set forth the times, places, the amounts paid, and the persons who received them. These persons are Fred. Whiteside, the accuser, H. H. Garr, W. A. Clark and H. L. Meyers. It is not controverted that these persons were, as alleged, all members of the assembly at the times mentioned in the charges. The accuser was the senator from Flathead county, and H. H. Garr a representative from the same county. W. A. Clark and H. L. Meyers were the senators from Madison and Ravalli counties, respectively. The amount alleged to have been paid by the accused to each one for his vote for W. A. Clark of Butte for United States senator, is: To Whiteside, \$5,000; to Garr, \$5,000; to Clark, \$10,000; and to Meyers, \$10,000.

The charge of conspiracy to bribe is upon information and belief. It is alleged that the accused, by and through others with whom he had entered into an unlawful and malicious conspiracy to corruptly influence the official action of members of the Sixth Legislative Assembly, paid to many members thereof, whose names are unknown, large sums of money, by which they were induced to vote for W. A. Clark of Butte for United States senator. At the hearing, proof was admitted under all these charges, the Court first requiring the attorney-general to furnish the accused a bill of particulars

containing specifications of names, amounts, times and places under the charge of conspiracy. We shall eliminate from this discussion all the charges based upon information, and address ourselves directly to the question of the guilt or innocence of the accused upon the specific charges of bribery. Furthermore, as the evidence is very voluminous and as, in our opinion, the order of disbarment must be made in case either one of these charges is sustained by the proof, we shall confine what we here say to the charge involving the payment of \$10,000 to W. A. Clark, of Madison county. We shall refer to the cases of Garr, Whiteside and Meyers only in so far as it may be necessary to elucidate this one. The portions of the evidence bearing upon the financial transactions of Warner, Geiger and Hobson we have discarded as entirely immaterial. W. A. Clark was examined as to his dealing with Wellcome, and we give his testimony in full: "Q. What is your name? A. W. A. Clark. Q. How old are you, Mr. Clark? A. I am thirty-six past. Q. How long have you lived in Montana? A. About thirty-five years. Q. What is your business? A. I am an attorney at law. Q. Where do you reside and where do you practice your business or profession? A. In Madison county, Virginia City. Q. Were you a member of the sixth legislative assembly? A. I was. Q. A senator or representative? A. I was senator from Madison county. Q. Do you know Mr. Whiteside? A. I do. Q. Do you know Mr. Wellcome? A. I do. Q. Do you know Mr. Metlen, of Beaverhead county? A. I do. Q. Do you know Mr. Paul, of Beaverhead county? A. I do. Q. State whether or not the last-named persons were members of the last legislative assembly. A. Mr. Metlen and Mr. Paul were members of the house of representatives. Q. Did you during your stay in Helena, in the performance of your duties as a member of the legislative assembly, have any conversation with Mr. Wellcome? A. I did. Q. Through whose invitation did you see Mr. Wellcome? A. Mr. Whiteside. Q. Can you tell us about the time you saw Mr. Wellcome? A. I think it was on the 4th

•

day of January of this year. Q. Where did you see Mr. Wellcome? A. I saw him in room 207 of the Helena Hotel. Q. Who accompanied you to the room? A. Mr. Whiteside accompanied me as far as the door. Q. Had you been introduced to Mr. Wellcome before that time? A. I had known Mr. Wellcome before that time. I had known Mr. Wellcome for two or three years. I had met him professionally. Q. Upon going to the door, did you go into the room? A. I went into the room. Q. Who were in the room at the time you went in there? A. When I stepped into the room, Mr. Wellcome was there and Mr. A. J. Steele. Q. How long did you remain in the room? A. I couldn't tell; probably ten or fifteen minutes. When I first stepped into the room, Mr. Steele and Mr. Wellcome passed out of the entry door, and I waited some little while before Mr. Wellcome returned, and I do not know how long I was there. Q. Upon the return of Mr. Wellcome, did you have any conversation with him? A. I did. Q. I wish that you would detail to the court, as explicitly as you can and with such circumstances as you can, the whole conversation that you had with Mr. Wellcome there. A. Well, when Mr. Wellcome returned, I said to him, 'Mr. Whiteside informed me that you wanted to see me.' He said, 'Yes; I wanted to talk over the senatorial situation with you.' He sat down, and commenced to talk over matters, and he said, 'We want you in this fight with us, and we want you hard.' He says, 'We are going to win,—we are going to get the votes; and if we don't get them one way, we are going to get them another.' He said, 'I want you to vote for Mr. Clark.' I said, 'What is there in it?' He said, 'There is ten thousand dollars in it for you.' I said, 'All right.' Mr. Wellcome then made the remark that he would turn the money over to Mr. Whiteside. I said that would be satisfactory, and the conditions were as he stated them,—that I was to vote for Mr. Clark for senator until they saw no chance of an election, or until they instructed me not to, but the money was to be turned over irrespective of Mr. Clark's election, if I voted for him. We then talked about the

matter— Q. Just interrupting you a moment to put a question. You went along in the narrative to the limit of testifying that Mr. Wellcome designated Whiteside, and asked you if he would be satisfactory? A. Yes, sir. Q. What did you say? A. I told him he would. He said he would get the money, and turn it over to Whiteside for me. I said I had no doubt but that he would do so, but I did not want to do business in that way; that I wanted to see the money turned over and counted, and then see Mr. Whiteside about it. Q. What did he say in reference to that? A. He said, 'We have not got the money now; we have pulled out all the big bills out of the Helena banks, but the old man [referring to Mr. Clark] will be over to-night with some currency, and I will see you then, and fix it up.' Q. What was said by you about that? A. I told him that was satisfactory. Q. Was that all the conversation you had? A. That was all the conversation I had. Q. When did you next see him? A. Somewhere about between nine and ten o'clock that evening. Q. Where did you see him then,—in what room? A. 201 at the Helena Hotel. Q. How did you happen to go to the Helena Hotel at that time? A. Mr. Whiteside told me that Mr. Wellcome wanted to see me, and took me to this room. Q. At what hour of the day was this,—about what time was this interview that you speak about? A. Some time between two or three or four o'clock; I could not say exactly. Q. The second was the same night? A. The second was the same evening, between nine and ten o'clock. Q. You went to room 201 on account of an invitation extended to you, if I understand you correctly, by Whiteside? A. Mr. Whiteside came after me, and said Mr. Wellcome wanted to see me, and took me to that room. Q. After you got to that room, whom did you find there? A. I found Mr. Wellcome there. Q. I wish you would detail now the conversation you had then, and who were in the room when the conversation was carried on. A. After I went into the room, Mr. Wellcome explained to me, and to Mr. Whiteside in my presence, the conditions about this money. Q. What were the conditions? What was this

explanation? A. It was to be turned over to Mr. Whiteside, to be delivered to me when I voted for W. A. Clark for United States senator until such time as they requested it, or until he was elected. Q. Then what took place? A. We sat, the three of us, in the middle of the room. Mr. Wellcome got up, and went over into that corner of the room (indicating), and made a remark about a picture hanging there,—about it being a fine engraving,—and said, ‘Come over here; Dr. Campbell occupies that room.’ There was a folding door, with curtains across at this end; and, when I went over in that corner, he pulled out an envelope out of his pocket, and laid it on the steam radiator, and he took the money out of the envelope, and counted it. It was not sealed at that time. He took out the bills, and there were ten one thousand dollar bills in it. Q. In respect to the points of the compass, what corner was it? A. The room being the same as this room, that corner (indicating) being the same as where the court sits, it was that corner. I am turned around in Helena as to the points of the compass, and I could not say. Q. It would be the southeast corner? A. I should judge it would be the southwest corner. Q. If you will, make a diagram showing the main street; that is, the street upon which the hotel fronts. (Witness complies.) Q. Now, which is the main street here? A. As I understand it, this is the street that the Helena Hotel is on. This is the front of the building (indicating), facing out this way (illustrating), this being the room to which I went with Mr. Whiteside, the room being about there (indicating). There was a small bath room about there, or something of that kind, and in this corner was where the money was handed to me, and here was the room designated to me as Mr. Campbell’s room. Q. Go ahead now, and detail about the nature of the money. A. He laid the money down on the radiator, and said there was the money. I picked it up and counted it. The envelope contained ten one thousand dollar bills. I took the money, put it back in the envelope, sealed it, and wrote across one end of the envelope, ‘The property of W. A. Clark, to be delivered to him under understood con-

ditions.' I do not know whether it was 'under understood conditions' or not. It was understood to be. In addition to that, I took a pen and threw a blot of ink on the envelope as an additional identification. Q. Did you make any further marks on the envelope? A. I wrote my initials on the flap. Q. I will ask you to look at that envelope, and state whether or not this was not the envelope which you had there. A. This is the envelope which I received from Mr. Wellcome, and the marks 'W. A. C.' on the back and this handwriting is mine. Q. What is this? A. That is the blot of ink which I threw on there from a fountain pen. Q. This is your handwriting? A. That is my handwriting on the top. (The envelope shown witness was Exhibit A.) Q. Now, after you did this with the envelope, what did you do with it? A. Mr. Wellcome and I walked over to the center of the room, and I handed it to Mr. Whiteside, in his presence. Q. Did any further conversation take place between yourself and Mr. Wellcome or Mr. Whiteside? A. Nothing, except Mr. Whiteside said he wanted to talk with Mr. Wellcome about some other legislators, and I took that as a dismissal, and I walked out and left them. Q. Did you have any other conversation with Mr. Wellcome? A. I did. I saw Mr. Wellcome— Well, I am getting along too fast. I am getting ahead of my story. I did have some conversation with Mr. Wellcome in a room. Q. What was said? A. He asked me to see Mr. Metlen and Mr. Paul, and see what I could do with them. Q. What did you say? A. I told him I would see them for him. Q. Did you at any time subsequent to that have a conversation again with Mr. Wellcome? A. The day the investigating committee was appointed, in the afternoon, I met Mr. Wellcome on Main street, down here about in front of the Western Union Telegraph office. He asked me at that time whether I had seen Mr. Metlen or Mr. Paul. I told him I did not, and I did not think anything could be done with them. Among other things, he said that perhaps he might fix it up by buying a lot of cattle from old man Metlen, as he expressed it. Q.

Mr. Clark, did you have any other conversation with Mr. Wellcome after the conversation that you detailed that took place on Main street? A. Yes sir. Q. Where? A. In the senate chamber, on the morning that the report of the joint committee was made,—just before the report. Q. Before or after the report was made? A. Just before the report was made. Q. What was the conversation that you had then? A. Mr. Wellcome came to me in the senate chamber. I was sitting by Mr. Norris' desk, and no one was near me, and he says, 'I suppose you understand the plan that has been arranged.' I said, 'Yes sir; I think so.' He said, 'We have arranged to have a number of our men vote for Mr. Conrad, so as to avoid any suspicion.' (End of direct examination.)"

Cross-examination: "Q. What time did you say you first went to Mr. Wellcome's room? A. I couldn't tell you the exact time,—some time between two and four o'clock. Q. You went there in company with Mr. Whiteside? A. As far as the door with Whiteside. Q. You had some previous conversation with him about going to the room? A. Yes, sir. Q. What was that conversation? A. Mr. Whiteside came to me the morning of that day, or the evening before, and informed me that the Clark people were using money to influence votes for United States senator; that he was trying to arrange to expose them, and wanted me to assist him; and, after thinking the matter over, I agreed to do it. Q. And your going to the room was in pursuance of the plan you had formed with Mr. Whiteside? A. Mr. Whiteside and I had agreed upon that proposition. Q. The first suggestion made to you was made to get you into this plan, was it not? A. Yes, sir. Q. Was there any offer to influence your vote corruptly other than the offer to enter into this plan? A. Nothing other than the offer Mr. Wellcome made me in this room. Q. Prior to this time there had been no offer made to you by anybody else? A. No, sir. Q. The offer made by Mr. Whiteside was to procure evidence of the improper use of money? A. Mr. Whiteside told me that the Clark people had come out, and said that they were figuring on buying my

vote, because I got out and hurrahed for Clark. Q. It was pursuant to this arrangement that you went there? A. Yes, sir. Q. Who first talked to you about this? A. The first man that talked to me about this was Mr. Campbell. Q. Did Mr. Campbell understand fully your purpose in going to this room? A. He did. Mr. Campbell came to me, and talked the matter over with me. Q. Now, then, after seeing Mr. Wellcome in his room the first time, did you have any other meeting with Mr. Whiteside prior to your second? A. Not that I remember of, excepting that he came to me that evening, and told me that Mr. Wellcome wanted to see me, and took me to this room about which I have already testified,—to room 201. Q. Who took you to room 201? A. Mr. Whiteside. Q. Where was Mr. Wellcome at that time? A. He was in room 201. Q. Had you seen him at any other time during the day? A. Not excepting this conversation I have testified about. Q. What time of the evening was that? A. Some time between five and six o'clock. All I know was I was going out on the evening train on the Northern Pacific, down to the eastern part of the state. Q. Did Mr. Whiteside see this money that was placed into the envelope? A. I could not say whether he saw him place the money in the envelope or not. Q. Where was he at that time? A. He was near the center of the room. Q. Did you tell him what the envelope contained? A. I did. Q. What did you tell him? A. I told him it contained ten thousand dollars. Q. Did you tell him the denomination? A. No, sir; I did not; that is, I don't remember that I did. I might have, but I don't believe that I did. Q. Did you show him the money? A. No, sir; my back was turned to him. Mr. Wellcome was standing over here, and he laid the money down on the register, like that, and I stood here, and my back was turned to Mr. Whiteside at the time. Q. Where were you when you sealed the envelope? A. I was standing in this shape, right across the register, this way (indicating). Q. Where was Whiteside? A. As far as I know, near the center of the room. I left him there when I went over to

Mr. Wellcome. Q. Now, after receiving this money and giving it to Mr. Whiteside, what else was done by you in pursuance of this plan of exposing bribery? A. Not a thing. Q. I understood you to say that you had never been solicited by Mr. Wellcome to visit his room prior to the occasion that you went there? A. No, sir. Q. Had he ever had any conversation with you relative to the senatorial question? A. I don't think I ever talked with Mr. Wellcome about it prior to that time. Q. Then is it not a fact that this meeting at Wellcome's room was arranged for you by Mr. Whiteside, in pursuance of the plan which had been agreed upon between you and Mr. Whiteside? A. I think it was. Q. The plan, in the main, was that you were to go there, and to receive whatever offers of money were made, or, if none were made, to solicit them? A. The plan was that Mr. Whiteside came to me, and told me that the Clark people were figuring on buying my vote; that he wanted me to make arrangements to have me go to Mr. Wellcome, so that we could have proof of what they were doing; and, in accordance with that plan, I went to Mr. Wellcome's room, at Mr. Whiteside's request, on the day I have named. Q. It was in accordance with that plan that you asked Mr. Wellcome what there was in it if you voted for Mr. Clark? A. Yes, sir. Q. Whiteside did not tell you beforehand that he was authorized to offer you any money? A. Mr. Whiteside told me that they were figuring on buying me; that is all he said. Q. He made no offer, or pretense of offer, did he? A. I don't remember that he made any direct offer to me. Q. About this plan which you had previously agreed on, did it involve the payment of any money which might be offered you through Mr. Whiteside? A. The plan between Mr. Whiteside and myself was, I declined to hold the money, and the arrangement was to be that Mr. Wellcome was to turn the money over to Mr. Whiteside, to be delivered to me when I cast my vote in accordance with the agreement that Mr. Wellcome and I had made. Q. The previous plan agreed upon was that the deposit was to be made and put in Mr. Whiteside's hands? A. Yes, sir; for me.

Q. And did not this previous plan also involve an arrangement that, if any deposit of that character was made, it was afterwards to be presented by you and Whiteside before a committee of the legislature, to be thereafter appointed?

A. I had nothing to do with that. I did not know anything about that. I don't know what Mr. Whiteside's plans were.

Q. What were your plans relative to the exposure?

A. I was simply to go there, and get the money from Mr. Wellcome, so that I would be able to swear before a court or anywhere else that he had offered me money for my vote.

Q. It was contemplated that you were to testify to the facts that you desired to learn?

A. It seems so, from the arrangement.

Q. It was agreed upon between you that whatever facts you ascertained there you would testify to?

A. I had no agreement to testify about anything or before anybody.

Q. Now, there was a committee subsequently appointed, was there not?

A. Yes, sir.

Q. Do you remember when the committee was appointed?

A. The day before the vote for senator was taken.

Q. Monday afternoon?

A. I don't know whether it was in the morning or the afternoon,—

all I remember of it is that it was that day.

Q. Didn't you say that you had no knowledge of the arrangement for the appointment of the committee before it was appointed?

A. I had not.

Q. You had not discussed that with anybody?

A. No, sir; I was not in the inside plans, if there were any.

Q. Who else had charge of what you term the 'inside plans'?

A. I don't know. The only conversation I had was with Mr.

Whiteside and Mr. Campbell, that I have testified to.

Q. You never had any further conversations with Mr. Campbell as to the perfection of the plans for the exposure, any further than the first conversation you had?

A. No, sir; I think not.

Q. After your transactions were taken up with Mr. Whiteside, you never renewed the discussion of the matter with Mr. Campbell?

A. I informed Mr. Campbell about the payment of the money and turning it over to Mr. Whiteside, but I never discussed with Mr. Campbell any of the plans, if they had any.

Q. Did you discuss with anybody, prior to being

called as a witness before the investigating committee, the facts about which you have here testified? A. I did not.

Q. When were you called as a witness before the committee? It was—The notice was served upon me the afternoon of the day the committee was appointed. The committee was appointed in the forenoon or afternoon. I don't remember.

Q. When did you appear before them? A. I appeared before them that evening.

Q. About what hour? A. I should judge about 10 o'clock.

Q. Who were present? A. The committee were present, Mr. Campbell, Mr. Meyers, Mr. Whiteside, and myself, and a number of other gentlemen, whose names I do not remember. Some of them were strangers to me.

Q. Do you remember any others besides those you have named? A. It seems to me that Mr. Walkup was there; I would not be positive. There were three or four gentlemen that I did not know.

Q. Who is Mr. Walkup? A. Some gentleman from Anaconda.

Q. Do you know Mr. Tuohy? A. Yes, sir.

Q. Was he present? A. I don't know whether he was or not; I don't remember.

Q. Do you know Mr. Harrity? A. Yes, sir.

Q. Was he present? A. He was there, I remember now, since you call the name; but I can't remember people's names.

Q. Who was Mr. Harrity? A. I don't know.

Q. Do you know what relation he had to the senatorial controversy? A. I do not.

Q. You don't know now what relation he had? A. No, sir.

Q. Do you know where he lives? A. I do not.

Q. Or what his employment is? A. I do not. I do not remember ever seeing him, until I saw him to-day on the street down here, since that time.

Q. Had you never seen him previous to that time? A. Not that I remember of.

Q. Don't you know that he came Monday night—the night of the investigating committee—in charge of Fred. Whiteside? A. I do not.

Q. Did you see him with him? A. No, sir; except in the meeting where the committee met; he was there.

Q. Where were you when Mr. Whiteside came to that committee room? A. I was in the room.

Q. Who came with him? A. I couldn't tell you.

Q. Who went away with him? A. I couldn't tell you that.

Q. Did you see Mr. Whiteside when he returned to the legislative hall on Tuesday morning? A. No, sir; I don't remember whether I did or not. Q. How long have you known Mr. Whiteside? A. I have known him since the session of the legislature two years ago. Q. How frequently between the session of two years ago and the opening of the session of last year had you seen him? A. I don't believe that—I don't recall of ever having seen him. I might have met him some place in the state. Q. You had no relation of any kind whatever between that time with him? A. No, sir. Q. And prior to that time you had no business relations with him? A. No, sir; none at all. Q. Your acquaintanceship simply covers the period of the legislative session of two years ago? A. Yes, sir; the last session and two years ago. Q. In that session of two years ago Mr. Whiteside took quite a prominent part in some investigation pending there, did he not? A. I so understood that he did. Q. Did you understand the purpose Mr. Whiteside had in his plans relative to the bribery investigation of this last legislature? A. Only what Mr. Whiteside and Mr. Campbell had told me their object was,—to detect Mr. Clark or anybody else that was using money for senatorial purposes. Q. Did you at the time Mr. Whiteside first presented the question to you consider that Mr. Whiteside was a reliable man? A. When Mr. Campbell first presented the question to me I objected to having anything to do with it until the whole condition of affairs was explained. I did not consider, from what I had seen, that Mr. Whiteside was reliable at that time; for at that time I did not understand, nor was it explained to me fully, what he might do. Q. You at one time entertained the idea that Mr. Whiteside was a scoundrel? A. No, sir; I did not. Q. Did you not testify before the grand jury in this city that was held on or about March 15, 1897? A. Yes, sir. Q. And did you not tell the grand jury that, in your opinion, Whiteside was a scoundrel, that the man was a scoundrel, and that his whole proceeding was rotten? A. I did not use that language. I used some very strong language in regard to the

last investigating committee, but I did not use that language.

Q. That was the investigating committee in which Mr. Whiteside was a minority member, and presented a minority report?

A. I believe it was. Q. Did you not characterize his minority report as false and fabricated by him or by somebody else?

A. I don't think I carried it that far. I think the purport of my testimony before the grand jury was to the effect that I was unable to understand the minority report, in view of the fact—I was acting as attorney for the capitol commission, and I asked Mr. Whiteside if he had anything further to present, and he said he didn't, and from that I conveyed the impression to the grand jury that I doubted his motive, and I did. Q. He withheld matters from that committee until after the legislature had adjourned?

A. It so appeared from the report. Q. And nothing had occurred in the meanwhile to change your views of the man?

A. No, sir. (End of cross-examination.)"

Redirect examination: "Q. You do not pretend to say now, do you, Mr. Clark, that he was incorrect in the statements that he made in respect of the capitol commission? A. From information that has come to me since that time, I think he was right. Q. So that if you did entertain the opinion at one time that he was a scoundrel, and with the information that you now have you think he was right, then your judgment about him was wrong, was it not? A. Yes, sir. Q. Do you know anything about a suit being brought against him by members of the capitol commission for defamation of character, caused by the publication of that report? A. Only by hearsay. Q. That was the only reason that you thought that he was actuated by scoundrelly motives,—because he said that he had nothing else to communicate, and subsequently presented the minority report? A. Yes, sir. Q. And, at the time that Mr. Campbell approached you concerning the briberies generally practiced at this last legislative session, you were then in the possession of information respecting the correctness or incorrectness of the charges that were made by Mr. Whiteside in his minority report? A.

When Mr. Campbell broached the matter to me, I told him I would not have anything to do with Mr. Whiteside until this matter had been cleared. I called his attention to the minority report, and then this matter was explained to me from beginning to end, and I changed my views of Mr. Whiteside.

Q. And, if you did at one time entertain that opinion that he was a scoundrel, you do not entertain that opinion now? A. No, sir. Q. Your change of opinion is consequent upon an investigation of these facts? A. Yes, sir; as far as I could ascertain in my subsequent experience with him in this connection and in this bribery business."

Recross-examination: "Q. Your investigation of the facts simply consisted in a statement of the pertinent facts by Mr. Campbell, who is Mr. Whiteside's attorney? A. Yes, sir; I relied upon Mr. Campbell's statement. I always found him honorable."

The only other witness who testified to the facts of this transaction was Fred Whiteside. His examination consumed the better part of two and one-half days. He frankly states that he came to Helena about the 31st of December, 1898, with the intention to expose those guilty of corrupt practices in connection with the approaching election of United States senator; it having already come to his ears that money was being used corruptly to influence members of the assembly in casting their votes. Upon learning that Wellcome, the accused, was managing the campaign of W. A. Clark, of Butte, he at once sought acquaintance with him, with the intention of gaining his confidence and, if he found him engaged in corrupt practices to expose him and others who were also guilty. By the 1st or 2nd of January this acquaintance had become sufficiently intimate to induce the accused to arrange with Whiteside to pay to the latter the sum of \$10,000 for his vote and for his aid in securing others by similar means. To this end Whiteside saw State Senators Meyers and Clark and Representative Garr. Meyers and Clark were induced to go into his scheme of exposure, to pretend to barter their votes for \$10,000 each, and turn the money over to Whiteside, so that

they would be able, as witnesses, to establish the bribery. Garr, who had already been tampered with by Wellcome, was not cognizant of this plan, but it was sought by Whiteside to get the \$5,000 intended for Garr into his (Whiteside's) hands, so as to betray him also. In pursuance of this plan, he brought Clark and Wellcome together at room 207 at the Helena Hotel, where the arrangement for Clark's vote was made, as Clark states. The story of this transaction is repeated by Whiteside in all substantial particulars as it is told by Clark. The deal was consummated on the evening of January 4th, at room 201 at the Helena Hotel, and the sealed envelope containing the money marked for identification, as stated by Clark, remained in Whiteside's possession until turned over on January 9th to the joint committee of the two houses sitting to investigate charges of bribery. In the meantime, and until the meeting of the committee, negotiations were going on for the vote of Meyers. This was finally arranged for on the 6th or 7th of January. On one of these days Meyers and Whiteside went to room 206, or an adjoining room, at the Helena Hotel. Whiteside went to Wellcome's room to bring Wellcome to pay over the money, but, finding him occupied, he received the money, \$10,000, and returned with it to the room where Meyers was. There it was counted, sealed up, marked for identification, and turned over to Whiteside for safe-keeping. This was opened by the investigating committee.

While these negotiations were going on, Whiteside also approached Garr. Finding out from him that he had arranged to vote for W. A. Clark for \$5,000, and had the money deposited with one A. J. Steele, but was dissatisfied with the arrangement, he set about persuading Garr to have this money also placed in his hands. He finally succeeded in getting the money returned to Wellcome by Steele, and then turned over to himself by Whiteside. This was done on January the 8th or 9th, at Wellcome's room at the hotel. Garr was not present, but, going in search of Garr, Whiteside found him, went with him to another room, and then Garr wrote his

initials upon the envelope containing the money. This was likewise turned over to the committee on the 9th. At this time he (Whiteside) also obtained from Wellcome \$5,000 in part payment of the sum promised him for his vote. This was also sealed up, and turned over to the committee. The bills in each package were \$1,000 bills, except the Meyers package, which contained \$10,000 in bills of different denominations, including six \$1,000 bills. The packages were all marked with the initials of the respective parties for whom they were held, the Clark package being marked, as stated by Clark, in Wellcome's presence at the time it was delivered. The envelopes were introduced in evidence as exhibits to Whiteside's statement. This is the substance of Whiteside's testimony about the origin of the \$30,000 turned over to the committee by him. Garr did not testify. Meyers was sworn as a witness, and corroborates the statement of Whiteside as to the occurrence in the room when the contents of the package intended for Meyers were counted and sealed up.

After accounting for the custody of these packages from the time they were turned over to the committee, by showing that they were opened, and then delivered, otherwise intact, to the state treasurer, the attorney general had the treasurer sworn, to identify the bills in each package by number and denomination. They were then introduced in evidence.

The accused was not sworn as a witness, but was present throughout the hearing. At the time appointed by this court for the accused to answer the charges, he did not appear in person. His answer was made under the oath, upon information and belief, of one of his counsel. Thus, the charges themselves are not challenged by any direct denial by him. The statements of Clark and Whiteside are not contradicted by any one. The accused is the only person, except Garr and Steele, in relation to the Garr matter, who could deny them, or otherwise enlighten the court concerning them; for it appears from the evidence of these witnesses that not more than one person was present with the accused at any of the negotiations, except in the one instance when Clark was paid the \$10,000 at room 201 of the Helena Hotel.

In the formal charges it is alleged that Wellcome was active in the support of W. A. Clark, of Butte, for United States senator. This is admitted. It may be further noted that in his testimony Whiteside details several conversations with Wellcome as to Wellcome's negotiations with many other members of the assembly whose votes he was trying to secure by the use of money and otherwise. The same remark may be made touching the testimony of Clark. Another circumstance, somewhat corroborative of the stories of Clark and Whiteside, in view of the conversation first had by Clark with Wellcome as to the intention of certain supporters of W. A. Clark, of Butte, is the fact that, when the election did finally take place, many Democrats and Republicans, who theretofore had opposed Clark's candidacy, shifted over and voted for him, without apparent cause. Steele was not called as a witness. Clark and Whiteside, prior to their examination in this court, had twice been examined touching these transactions,—once before the legislative committee, and once before a grand jury called by one of the judges of the First district to inquire into the charges made before the committee. Their statements made on both these occasions were in the hands of counsel at the hearing. And though both were thoroughly cross-examined by able and astute questioners, and every opportunity was afforded to test their truthfulness by a comparison of these statements, no substantial discrepancies were shown. A careful and painstaking examination of their accounts given at the hearing, in so far as they relate to the same matters, also fails to reveal any substantial contradiction or omission. These statements are not unreasonable, in the light of this whole record, and it is highly improbable that such a story could be deliberately concocted and repeated so many times without being discredited in some substantial particular. After seeing and hearing the witnesses ourselves, and noting the silence of the accused when he ought to speak, and his failure to produce other witnesses to rebut material statements made by Clark and Whiteside, which it was in his power to do, we can reach no other reasonable conclusion than that this charge is true.

2. Having reached this conclusion, nothing would be left to do but to direct the order of disbarment to be entered, were it not that we feel it our duty to notice briefly the principal reasons presented by counsel why this order should not be made.

It is urged by counsel that the failure on the part of the accused to be sworn in his own behalf may not be used to his prejudice. Counsel say that this is, to all intents and purposes, a criminal investigation, and that the rule laid down on this subject in Section 2442 of the Penal Code should be applied. The answer to this is that "this is not a criminal prosecution, nor an aid to a criminal investigation, but is to ascertain if the accused is worthy of the confidence, and is possessed of that good moral character, which is a condition precedent to the privilege of practicing law and continuing in the practice thereof." (*In re Wellcome*, 23 Mont. 213, 58 Pac. 47.) This is a special proceeding of a civil nature, and the rules applicable to criminal cases do not apply. (*In re Wellcome*, 23 Mont. 259, 58 Pac. 711; *In re Randel*, 158 N. Y. 216, 52 N. E. 1106.) If the accused is not guilty, nothing would have been easier than for him to deny all knowledge of the charges laid at his door. His having failed to testify in his own defense, when he should do so, and deny the statements of Whiteside and Clark, not only justifies, but irresistibly impels, this court, upon the evidence before it, which is credible, to the conclusion that he is guilty.

Certainly, the accused is presumed to be innocent until the contrary appears, but in this kind of proceeding this presumption remains with him only until it appears to the Court with reasonable certainty that he is guilty. (*State ex rel. Stapleton v. Wines and Booth*, 21 Mont. 464, 54 Pac. 562.) When this is made to appear, then it is incumbent upon him to speak.

These remarks also dispose of the contention of counsel that the Court must be satisfied of the truth of the charges beyond a reasonable doubt. This rule applies only to criminal cases as such. The rule of *State ex rel. Stapleton v. Wines and*

Booth, supra, is the one applicable here. But, even if the rule contended for should be applied, we are of the opinion that the proof in this record, as heard by us from the witnesses themselves, and tested by the ordinary rules of weighing evidence, is sufficient to satisfy any impartial, fair-minded person, beyond a reasonable doubt, that the accused paid W. A. Clark, of Madison county, \$10,000 for his vote.

Counsel also contend that the witnesses Whiteside and Clark are not worthy of belief, because six men from the respective neighborhoods where they live swore that each of them bears a bad reputation there for truth, honesty and integrity. That these witnesses did so swear is true. The six witnesses by whom it was sought to impeach Whiteside swore that they would not believe him on oath. Those called to impeach Clark did not say that they would not believe him on oath. An analysis of the testimony of the witnesses who testified as to the reputation of Whiteside shows that most of them were the staunch advocates of the candidacy of W. A. Clark for the senate, and political enemies of Whiteside. Some of them had had differences with him about money matters, and at least one stated that he had had a good opinion of Whiteside until he had made the charges of corruption against W. A. Clark, of Butte, and his friends. This witness admitted that he had loaned considerable sums of money to Whiteside without any security up to the time of the election in 1898, and that he had voted for Whiteside at that election. It further appeared that Whiteside was declared the successful candidate at that election, though he was afterwards deprived of his seat upon a contest in the state senate, wherein his opponent was declared elected by less than a dozen majority.

The result of the attempt to impeach Clark tended to show that he is by nature an avaricious man, and no more. This testimony also came from persons evidently made unfriendly by litigation in which Clark was the attorney for the adverse party, or by differences arising out of his professional relations to them. Moreover, it appears that a majority of the

people in Madison county had sufficient confidence in him to elect him to the state senate from that county. Neighbors and acquaintances testified to the good reputation of both Whiteside and Clark for truth.

But the most convincing proof of the truth of their testimony is their manner and behavior under examination, and the manifest impossibility that they could concoct such a story, involving so much detail and so many incidents, and repeat it three different times, without betraying their falsehood. Again, it does not appear that either of these men, or both together, could in any way command large sums of money. No attempt was made to show this. The record tends to prove that Whiteside is a man of small means. Yet the money—\$30,000, all in \$1,000 bills, except \$4,000 of the Meyers package—is in the hands of the state treasurer as a result of the exposure,—a significant fact to be explained or accounted for on no other theory of the proof in this record than that it came from the hands of the accused. And this brings us to the consideration of another feature of the defense.

Counsel for the accused at the opening of their proof proposed to show that for many years there has been a schism in the democratic party in this state; that one division is favorable to W. A. Clark, of Butte, and the other follows the leadership of one Marcus Daly, and is known as the "Daly gang;" that the effort of the latter has always been to rule the party at all hazards; that one of its purposes has been to defeat W. A. Clark, by fair or foul means, in his aspirations to go to the senate of the United States; that the witnesses Whiteside and Clark belong to this "gang;" that the exposure was the result of a criminal conspiracy among various members of this "gang," including Clark, Whiteside and Meyers, falsely to charge W. A. Clark, of Butte, and his friends, with bribery, and thus defeat him; and that the money turned over by Whiteside was really furnished by that faction to give the color of truth to the charges made against Wellcome. Evidence was introduced by the accused in sup-

port of this defense. But taking this all together, and giving it the utmost weight to which it is entitled, it is hardly sufficient to require consideration, as it establishes nothing beyond the fact that there is and has been for some years a strong political hostility between W. A. Clark, of Butte, and Daly, as rivals for leadership in the democratic party. There is no fact proved from which an inference is permissible, upon any legal principle, that the opposition from the Daly faction of the party was other than such as was perfectly lawful. It was certainly no crime for any number of men to combine together to elect W. A. Clark, of Butte, by lawful means, to the United States senate. It was certainly equally lawful for any number of men to join forces to defeat him, if they used lawful means only. It does not appear in this record that the opponents of Clark used any unlawful means in their opposition to him; nor is there a scintilla of proof tending to show that any of them furnished the money in evidence in this case.

It appears from the proof that the accused has heretofore borne an excellent reputation for honesty and integrity in his profession. This fact we have considered in his favor. But a spotless reputation is no defense for a crime, where the proof establishes it as a fact. So, in this proceeding, being satisfied, from all the evidence that the accused is guilty notwithstanding his previous good character, we must so find. (*People v. Betts* (Colo. Sup.) 58 Pac. 1091.)

Finally, counsel insist that men who deliberately deceive another in order to win his confidence with a purpose to betray him are not worthy of belief, and that an attorney, heretofore above reproach, should not be degraded from his profession upon the testimony of men in the position of Whiteside, Clark and Meyers. Courts always act cautiously upon such evidence. Many of them condemn such action in the severest terms. We ourselves agree that the course pursued by these persons is to be censured. Far better and more righteous would it have been for Clark and Meyers, who are members of the bar of this Court, to have gone to Wellcome, their brother lawyer, and, if possible, persuaded him to desist from the abhorrent practices he was engaged in; far more

in accord with those sentiments of professional honor and integrity which high minded lawyers should always possess to have recalled him to a sense of duty to the law and not to have deceived him and encouraged him to commit crime. But, however reprehensible it may be as violative of the principles of propriety and morality, the fact that a witness has acted as a detective or decoy, apparently entering into the criminal plan in order to detect and expose it, does not, of itself, render his evidence unworthy of belief. The adjudicated cases are numerous where convictions upon this character of evidence have been sustained. (8 Am. & Eng. Enc. Law (2d Ed.) 295; *State v. Stickney*, 53 Kan. 308, 36 Pac. 714; *People v. Noelke*, 94 N. Y. 137; *Grimm v. U. S.*, 156 U. S. 604, 15 Sup. Ct. 470, 39 L. Ed. 550; *Rater v. State*, 49 Ind. 507; *U. S. v. Slenker*, (D. C.) 32 Fed. 691; *State v. Jansen*, 22 Kan. 498; *U. S. v. Moore* (D. C.) 19 Fed. 39; 3 Rice, Ev. 522, 523.)

The fact that the act here charged as a ground for this proceeding had no connection with the professional conduct of the accused makes no difference as to the treatment to be given it by this court. Under our statute, as heretofore construed in this case (*ante* p. 140, 58 Pac. 45), offenses within the line of professional duties, and those without these lines, stand upon the same footing, so far as concerns the quantum of proof necessary to establish them. Nor does it matter that no injured suitor is demanding redress. With the motives prompting this action on the part of the accuser we have nothing to do, further than as they reflect upon the credibility of his story. The ultimate end sought by him may be very far from an honest purpose to purge the profession of an unworthy member. Still, when a charge of this kind is presented, and the proof is made showing that a member of the profession has been guilty of acts tending to subvert the very foundations of society, the Court must act, painful to us as the performance of the duty in this case is, be the ultimate consequences what they may.

It is therefore ordered that John B. Wellcome be removed from his office of attorney and counselor of this Court, and that his name be stricken from the roll.

STATE, RESPONDENT, v. PEPO, APPELLANT.

[No. 1,455.]

[Submitted January 3, 1900. Decided January 22, 1900.]

23	473
33	514
23	473
32	451

23	473
c38	337
38	338

Criminal Law—Homicide—Jury—Misconduct of Officer—Trial—Evidence—Review—Exceptions—Necessity—Request to Charge—Charge on the Evidence—Corpus Delicti—Proof Required—Sufficiency of Evidence.

1. Where the affidavit of a member of the jury convicting accused of murder stated that the bailiff remained in the same room with the jury an entire night, within hearing of their discussions, and conversed with some of the jurors; and the bailiff's counter affidavit stated that he entered the jury room about 1 a. m. to take the jury lunch and bedding, and thereafter slept just inside the door, at which time all but four of the jury had retired, and that he did not speak to any of the jurors about accused, and the case was not discussed in his hearing; and affidavits of other jurors showed that the bailiff did not mix with the jury, and took no part in the discussion of the case,—such affidavits showed no prejudicial misconduct of the jury towards defendant.
2. Permitting the prosecution to ask a witness as to a conversation between himself and deceased, over defendant's objection that he was not present, was not error, where the witness later testified to defendant's presence.
3. Exclusion of evidence will not be reviewed, in the absence of an exception taken to the ruling.
4. Where, in a prosecution for homicide, decedent's identity was in issue, it was not error to refuse defendant's request to charge that a witness having but a casual acquaintance with a party is entitled to comparatively little weight after a comparatively short lapse of time, since such request amounted to a charge on the weight of evidence.
5. Penal Code, Sec. 356, provides that no person can be convicted of murder or manslaughter unless the death of the person alleged to have been killed, and the fact of the killing by the defendant as alleged, are established as independent facts,—the former by direct proof, and the latter beyond a reasonable doubt. *Held* that, since the *corpus delicti* is directly proved when a dead body is found under circumstances warranting an inference that a person has been feloniously killed, direct proof of the identity of the victim is not required, but only direct proof of death.
6. Circumstantial evidence reviewed and, *held*, sufficient to sustain a verdict of murder in the first degree.

Appeal from District Court, Teton County; D. F. Smith, Judge.

WILLIAM PEPO was convicted of murder, and he appeals.
Affirmed.

Mr. J. G. Bair and Mr. M. D. Baldwin, for Appellant.

There was misconduct on the part of the bailiff in charge of the jury after they had retired to deliberate upon their verdict by which a fair and due consideration of the case was prevented. "The presence of the bailiff in the jury room with the jury, after it has been charged, is fatal to the verdict, and this, though he speaks no word to the jurymen." (American and English Encyclopedia of Law, First Edition, Vol. 16, p. 531, citing *People v. Knapp*, 42 Mich. p. 267; *Rickard v. Scott*, 47 Ind. p. 275, and numerous other cases.) The counter affidavits submitted by the state should not, we think, have been received or considered by the court. It will be observed that in these affidavits the affiants state that they were not influenced in their verdict by the presence of the bailiff. The bailiff, also, in his affidavit, sets forth in substance that he held no communication with the jurors, and that he did not discuss the cause with them. This affidavit, and in fact all the affidavits filed by the state, should go for nothing. (*Wright v. Eastlick*, 58 Pac. p. 87.) We do not believe it is pertinent to the question here under consideration whether the presence of the bailiff or any action of his while in the jury room had any influence upon the verdict or whether it had not. (*Palmer v. Railway Co.*, 13 Pac. 429.) The bailiff had no right to be in the jury room, no more right than the court itself had to be there, and his presence there during the hours of their deliberation was a grave irregularity. (*People v. Backus*, 5 Cal. p. 276; *Organ v. State*, 26 Miss. p. 78.) If the bailiff may be allowed to make his bed among the jurors, talk with them, and remain all night among them, why should it be deemed an irregularity if the sheriff, the clerk, or the court should take the same action. The bailiff is an officer of the court, and represents the court, and in this case, where the issue of life and death depended upon the verdict, the defendant is surely entitled to the benefit of every safeguard that would tend to render his trial a fair and impartial one, and free from every irregularity. (*People v. Backus*, 5 Cal. p. 276; *People v. Stokes*, 103 Cal. p. 194.) This defendant was entitled to have a trial of his cause by the

twelve jurors sworn to try his cause, and for the trial to be perfectly fair it must have been regular, so that no suspicion of influence from extraneous sources upon the verdict rendered could attach to that verdict. Such a trial he has not had, for not one of the eight jurors who have made affidavits denies the presence of the bailiff in the jury room during the night. (*People v. McCoy*, 71 Cal. p. 395; *People v. Brannigan*, 21 Cal. p. 388.) Under the authorities first cited in support of defendant and appellant's position, Am. and Eng. Ency. Law, Vol. 16, p. 531, and cases therein cited, the action of the bailiff was undeniably a grave misconduct, and a very unusual irregularity, an irregularity surely as imprudent and as foreign to any rules of good practice as those specific irregularities that appear in the cases subsequently cited, and from which we have quoted, an irregularity which, if allowed to stand as a precedent, especially in cases of as grave import as the case at bar, will subject the criminal practice of the state to a train of abuses that will be subversive of the commonest justice which the constitution guarantees an accused person. For further authorities on this point, see *People v. Azoff*, 105 Cal. p. 132; *Woodward v. Leavitt*, 107 Mass. p. 466; *McDaniels v. McDaniels*, 40 Vt. p. 374; *Knight v. Inhabitants of Freeport*, 13 Mass. p. 218.

In order to sustain a conviction in this cause, it is essential that the state prove, beyond a reasonable doubt, that the deceased was Julius Plath. This, we submit, the state has failed to establish by any reliable evidence whatever. There is no word of testimony by which the identity of the body found as being that of Julius Plath can, or ought to be, inferred, unless it be that the coat found upon the body resembled a coat once worn by Plath. State's witnesses Schmidt, Ormsby, Burd, Sulgrove, all agree that there was no trace of features remaining about the body when found; that the flesh was all gone from the face, and the teeth were scattered around the cot. There is not one word of testimony on the part of the state's witnesses that shows that by any examination whatever the remains were found to be those of a male person. Wit-

ness Arnold testifies that, as undertaker, he took charge of the body for burial; that the clothes were then on the body; that there was no flesh on the face at all. The same witness testifies that he did not know whether the remains he buried, and which are alleged by the state to have been those of Julius Plath, were the remains of a man or not. "Where only mutilated remains have been found, it ought to be clearly and satisfactorily shown that they are the remains of a human being, and of one answering to the sex, age and description of the deceased." (Greenleaf on Evidence, Vol. 3, p. 112.) "The most positive and satisfactory evidence of death is the testimony of those who, having been acquainted with the deceased in his lifetime, have seen and recognized his body after life was extinct. No less satisfactory measure of proof should be required in a capital trial." (Greenleaf on Evidence, Vol. 3, p. 112.) "Where there is no evidence upon a point essential to sustain the verdict, a new trial will be ordered." (*Cummins v. Scott*, 20 Cal. p. 84.) "To justify a conviction one must not only be proven to have committed an offense, but the very offense charged." (*People v. Fagan*, 98 Cal. p. 230.) "Judgment of the lower court will be reversed when the bill of exceptions shows that there was a total failure to prove the *corpus delicti*." (*People v. Olivia*, 60 Cal. p. 69.) There is in the testimony no legal evidence in proof of the allegation that the deceased was Julius Plath, or even that the deceased was a male person. "Where the verdict does not have some meritorious support from the evidence, it will be set aside and disregarded." (*Smith v. Belshaw*, 89 Cal. p. 427.) "The court, on review of the proper motion made in the court below and there denied, will order a new trial where the evidence given at the former trial was without substantial conflict opposed to the verdict." (27 Cal. p. 40.) "In all criminal prosecutions, no matter what may be the kind of evidence on which they rest, the burden is on the prosecution to prove the *corpus delicti*." "The death in homicide should be distinctly proven, either by inspection of the body, or other evidence strong enough to leave no ground for reasonable

doubt. The test is applicable to all crimes." (Wharton's Criminal Evidence, Ninth Edition, 244, citing 1 Starkie on Evidence, 575.) "A witness having but a casual acquaintance with a party is entitled to comparatively little weight after a short lapse of time." (See Wharton's Criminal Evidence, Eighth Edition, p. 806, Sec. 806, par. 1, under head of "Opportunities of Observation.")

Mr. C. B. Nolan, Attorney General, for the State.

MR. JUSTICE HUNT delivered the opinion of the Court.

The defendant, William Pepo, was charged with murder in the first degree by having killed one Julius Plath, about June 15, 1898, at Teton county.

About June 29, 1898, a dead body was found in a small cabin near Muddy river, in Teton county. The person who found it discovered that the door of the cabin was fastened on the outside with wire. The body was badly decomposed, the flesh having fallen away from the head, and the hair having fallen off. It was lying in a bunk, and was clad in a black shirt, vest, and black coat, with binding upon it; the trousers were very dark, with a stripe in them, and covered with overalls with a bib upon them. The little hair that there was about the head was of very dark brown color. The skull was mashed above the forehead, as if hit by a blunt instrument, and the brains had oozed out. The body measured five feet six inches in height. Upon the floor of the cabin, by the head of the bed, was a cracker box, in a handkerchief. There was also an overcoat found in the cabin, in which was a memorandum book. The shoes were upon the floor near the head of the bed, and by them was found a watch charm. There were no evidences of any struggle having taken place. There was also found near the cabin a heavy piece of iron, upon the end of which was blood and dark hair. This defendant was afterwards convicted of the crime of having murdered the person whose body was so found, and from the judgment sentencing him to death, and from an order denying his motion for a new trial, he prosecutes this appeal.

1. The first point urged upon our attention is the alleged misconduct of the jury. This is set forth in the affidavit of one of the jurors, named De Haas, who stated that after the court had instructed the jury, and upon the night of June 1, 1899, and during the whole of said night, the jury deliberated in their efforts to reach a verdict; that during the deliberations of said jury, and during the discussion of said cause, the court bailiff entered the jury room, at about 11 o'clock on said night, and remained in the jury room with the jurors during the entire night; that conversation and communication took place between the said bailiff and some of the jurors during said night, and that during all the night the said bailiff was in close proximity to all of the jurors, and within the hearing of all the discussions upon the case; that he remained in the jury room from midnight of said day until daylight of the next morning; and that the said bailiff departed from the jury room before the jury had reached and agreed upon a verdict. In opposition to this affidavit the bailiff, by counter affidavit, set forth that he did not enter the jury room where the jury were deliberating until about 1 o'clock a. m., June 1, 1899, at which time he took the jury a lunch and some bedding; that at that time he did not speak to any of the jurors about the case, and the case was not then being discussed within his hearing; that about 2 o'clock a. m. of said date he entered the jury room, and lay down just inside of and close to the door leading into the jury room; that at that time all the jurors had retired for the night, except four, one of whom was the juror who made the affidavit just heretofore referred to; that when he lay down the said jurors were in the remote part of the room from where he was; that the room in which the jury held its deliberations was 70 feet in length by 30 feet in width; that he fell asleep in a very few minutes after lying down, and that he heard no part of any conversation, if any there was, of the case by the jury; that at about 4 o'clock in the morning he woke, and left the room before the jury resumed their deliberations; that at no time during the night was he among the jury, nor was he present at any time when

the case was under discussion; that no conversation took place between him and the jury, or any of the jurors, about the case; that he neither said nor did anything with the intent to prejudice or bias the jury against the defendant, or in any way to influence any of them in rendering a verdict, but that he performed his duties as court bailiff honestly and conscientiously, and without bias or prejudice.

Adolph Fellers, one of the jurors, in his affidavit stated that about 1:30 a. m. the bailiff entered the room with bedding, and that about 2 o'clock all the jurors retired, except himself and three others; that after the jury had retired the bailiff came into the room and lay down by the door; that during the time the bailiff was in the room he had no communication with any of the jurors, and that the jury were not deliberating or discussing the case while he was in the room, but that the bailiff left the jury room in the morning, before the jurors who had retired were up, and before discussion of the case was resumed; that the bailiff did not mix with or discuss the case with the jury, or any of them, while he was in the jury room. Other jurors corroborated the statement contained in Fellers' affidavit.

John Jackson, Sr., who was one of the jurors who did not retire before the bailiff came into the room, also filed an affidavit in which he said that when the bailiff came into the jury room there was no conversation between the jurors and the bailiff about the case under consideration, and that the bailiff at no time mixed with the jury or took part in the discussion of the case, but that he left the room before the jurors who had retired were up.

From the foregoing affidavits we think it is fair to say that there was no misconduct on the part of the jury which tended in any way to prejudice the substantial rights of this defendant. Although it has been held by some courts that the mere presence of the bailiff in charge of a jury in the jury room during their deliberations will vitiate the verdict, the rule established in this jurisdiction is different, for it was laid down in *State v. Jackson*, 9 Mont. 508, 24 Pac. 213, that if misconduct be

shown, tending to injure the defendant, prejudice is presumed, but not absolutely. "The state," said the Court, "may remove that presumption, and the burden is upon it to do so, and in so doing it may use the testimony of the jurors to show facts which prove that prejudice or injury did not or could not occur." The finding of the district court that there was no prejudice is so clearly sustained that we are not authorized to disturb it. The affidavit of juror De Haas, upon which the defendant relies, in itself fails to show any prejudice, other than such as might be deduced from the presence of the bailiff in the jury room while four of the jurors were up and possibly discussing the case; and whatever presumption might have been raised by that fact alone is well rebutted by the counter affidavits upon which the district court made its finding. (*Doles v. State*, 97 Ind. 555; *Fitzgerald v. Goff*, 99 Ind. 28; *State v. Hopper*, 71 Mo. 425; *State v. Summers*, 4 La. Ann. 26; *Territory v. Clayton*, 8 Mont. 1, 19 Pac. 293; *Territory v. Burgess*, 8 Mont. 57, 19 Pac. 558; *State v. Jackson*, 9 Mont. 508, 24 Pac. 213; *State v. Anderson*, 14 Mont. 541, 37 Pac. 1; *State v. Gay*, 18 Mont. 51, 44 Pac. 411.)

2. Error is assigned because the court overruled an objection to a question propounded to a witness, asking him to state a conversation between Julius Plath, the deceased, and witness; the ground of the objection being that the defendant was not shown to have been present at the conversation. There was no error in this ruling, inasmuch as witness stated later on in his testimony that at the time of this conversation the defendant was present.

3. A witness named Kropp testified that he had seen a man resembling the photograph of Plath a day or two before the alleged killing, and took him to be a man of 22 or 23 years of age. Thereupon, upon cross-examination, defendant's counsel asked witness how old a man he would take Mr. Wright to be. The state objected, and the court sustained the objection. No exception appears to have been taken to the ruling of the court; hence we pass the matter.

4. The court refused to charge, as requested by the

defendant, that "a witness having but a casual acquaintance with a party is entitled to comparatively little weight after a short lapse of time." The instruction was correctly refused,—to have given it would have been serious error. It is a plain direction to the jury in relation to the weight to be given to the testimony of a witness. (*State v. Gleim*, 17 Mont. 17, 41 Pac. 998, 31 L. R. A. 294; *State v. Gay*, *supra*.)

5. We are also asked to reverse the judgment because the verdict is not sustained by the evidence. To this assignment we have given the most attentive consideration, and our judgment is that it is very seldom that a case presents itself which so entirely fulfills the exact requirements of the law in relation to the measure of proof demanded to sustain a conviction of murder where the state relies upon circumstantial evidence. Under this assignment the argument is advanced that the evidence as to the identity of the body is unreliable and unsatisfactory. Counsel make the point that there was no direct evidence to identify the body found as that of Julius Plath, who was alleged to have been killed by the defendant, Pepo. Section 358 of the Penal Code provides that "no person can be convicted of murder or manslaughter unless the death of the person alleged to have been killed, and the fact of the killing by the defendant as alleged, are established as independent facts; the former by direct proof and the latter beyond a reasonable doubt." This statute is taken from the New York Code, which is identical in its language, with this exception: That the New York Code provides that the death of the person alleged to have been killed, and the fact of the killing by defendant as alleged, shall *each* be established as independent facts. But we think that the same rules of interpretation should be applied to the Montana statute that control in New York. In *People v. Palmer*, 109 N. Y. 110, 16 N. E. 529 (a case in many respects similar to the one at bar), the court of appeals considered the section under discussion, and concluded that in prohibiting a conviction of murder or manslaughter unless the death of the person alleged to have been killed, and the fact of killing as alleged,

are each established as independent facts (the former by direct proof, and the latter beyond a reasonable doubt), the law does not require direct proof of the identity of the victim, but only of death. It is made clear by the learned opinion of Judge Finch that the *corpus delicti* means the existence of a criminal fact. That such a fact exists is directly proved when a dead body is found under circumstances such as were brought out on the trial of this case. But, by requiring the *corpus delicti* to be established by direct proof, the law does not include the identity of the murdered man, but leaves that open to indirect or circumstantial evidence, to be established on the trial. "The requirement of the Code," say the Court, "goes upon the assumption that the identity of the deceased, either by name or description, has been established in the ordinary way, and then requires that the death of that person thus identified shall be directly proved, and the killing by the prisoner of the same person shall be shown beyond a reasonable doubt. Those two facts alone are the subject of the legislation, and they are properly referred to as 'each,' and correctly described as the 'former' and the 'latter.' No purpose to change the settled rule of the common law is disclosed, but simply an intent to declare it as it had long existed."

The evidence in all respects sustains the verdict of the jury. It appeared that Julius Plath and this defendant knew one another well in the dominion of Canada, and that they said when leaving there that they were going to this section of the United States. Plath had about \$120 in money when he left Canada. He was clad in blue overalls, with a bib, black coat, with braid upon it, and black shirt. Defendant and a shorter man, recognized by photographs as Plath, were together in Teton county, at or near a railroad station not many miles from where the body spoken of was subsequently found, a day before June the 15th. Pepo and Plath both had sacks of clothing shipped to them at Shelby from Lethbridge. For these they never called. The two men were seen together by several ranchmen about June 13th or 14th, going towards Choteau. The people who saw the two identified one as

resembling the photographs of Julius Plath, and said that he had on a black coat, with binding, blue overalls, with a bib, and a watch chain with a charm hanging from it, and that he carried a small box in a handkerchief. Pepo carried some bedding. They inquired the direction to the town of Choteau, and about June 14th were told by a farmer that if they were overtaken by night they could find a place to sleep in a little log cabin about five miles from his place; and towards this log cabin they took their footsteps. It was in this cabin that the body was afterwards found. Nothing more was ever seen of the smaller man, recognized by photographs as Julius Plath. The defendant was seen several weeks afterwards near the city of Great Falls, where he asked the way of a trail through the mountains. About nine months afterwards the defendant was arrested in the state of Washington. He was then living under an assumed name, and, when arrested, told the sheriff that the watch chain which he was wearing did not belong to him, and he wished to give it to the man on the place where he was working, who owned it. No one claimed the chain there, however, and it was brought back to Montana by the sheriff. The coat found upon the dead body was identified by the persons who had seen the two men before as having been worn by the shorter man, and particularly was it recognized by the brother of the deceased, who pointed out a hole in the side of the coat that had been torn, and sewed up by his mother, before his brother, Julius, left his home in Canada, months before. The blue overalls on the body were identified as being such as Plath had worn. The shirt was also identified. So were the trousers on the body. The color of the hair and the height of the body were sworn to as corresponding with Plath's. The watch charm picked up on the floor of the cabin was also recognized by a child who had seen the two men at the ranch of her father the day before the murder was alleged to have been committed, June 15th, and who observed the charm on the smaller man's vest. In the pocket of the overcoat found in the cabin where the body lay was a memorandum book containing entries sworn to have

been made in the handwriting of defendant, Pepo. A blanket found near the body was recognized to be the same one that Pepo had had in Canada a year before. The watch chain which Pepo wore at the time of his arrest was said to resemble the one that deceased had had on. A cracker box, with some crackers in it, and a handkerchief, found on the floor of the cabin, near the body, were identified as resembling ones that had been observed in the possession of the smaller man by several persons who had seen the men a few days before the murder was said to have been committed. The defendant denied that he had been with Julius Plath at all in Montana, and denied that he had seen any of the persons who said they recognized him. But the truth or falsity of his story was a matter exclusively for the jury, and cannot be accepted by us at this time as sufficient to overthrow the overwhelming force of the evidence on the part of the state.

We find no error in the record, and must affirm the judgment and order appealed from.

Affirmed.

STATE, RESPONDENT, v. HURST, APPELLANT.

[No. 1,428.]

[Submitted January 2, 1900. Decided January 29, 1900.]

*Criminal Law—Homicide—Evidence—New Trial—Witnesses
—Impeachment—Jury—Instructions—Argument of Counsel
—Review—Bill of Exceptions.*

23	484
24	558

23	484
26	4
26	6
26	7
26	839

23	484
27	384
28	484
28	328

23	484
38	120

23	484
38	44

23	484
40	339

1. Evidence reviewed and, *held*, to justify a verdict of guilt of murder.
2. A witness' credibility and the effect to be given his evidence are for the jury to determine.
3. The appellate court cannot try a case *de novo*, and thus invade the province of the trial court by passing upon disputed questions of fact and the credibility of witnesses.
4. Refusal to grant a new trial of a criminal case for insufficiency of evidence will not be disturbed on appeal where the evidence was conflicting, and tended to support the verdict.
5. Where a witness based her testimony that threats against deceased were made by defendant on her recognition of his voice, it was not error to exclude evidence tend-

ing to show that such witness had mistaken the voice of another person on a different occasion, where it was not shown that the conditions were the same.

6. It was not error to allow the state to ask defendant's witness a question on cross-examination for the purpose of laying a foundation for his impeachment which was not germane to his direct testimony, since the state could have recalled the witness at any time for such purpose.
7. Under Code of Civil Procedure, Sec. 2880, declaring that a witness may be impeached by evidence that at other times he made statements inconsistent with his present testimony, a witness having denied making statements at a coroner's inquest, the state was properly allowed to call another witness in rebuttal, who was present when such statement was claimed to have been made, and ask him whether the former witness made a certain statement just after he finished his testimony before the coroner.
8. Where a jury in a criminal case had been fully instructed as to their individual duties under the law, it was not error for the court to refuse to instruct that if, after consideration of the whole case, any juror entertained any reasonable doubt of the guilt of the defendant, it was the duty of such juror not to vote for a verdict of guilty, nor to be influenced in so voting for the single reason that a majority of the jury were in favor of a verdict of guilty.
9. On appeal, alleged objectionable statements of counsel in argument cannot be considered, nor the action of the trial court thereon be reviewed, unless they, and the ruling of the court thereon, are preserved in a bill of exceptions and properly certified.

Appeal from District Court, Dawson County; Charles H. Loud, Judge.

JOSEPH HURST was convicted of murder, and he appeals.
Affirmed.

Mr. William Wallace, Jr., Mr. H. J. Haskell, Mr. G. W. Myers, and Mr. C. R. Middleton, for Appellant.

Mr. Thomas C. Holmes, and Messrs. Strevell & Porter, for the State.

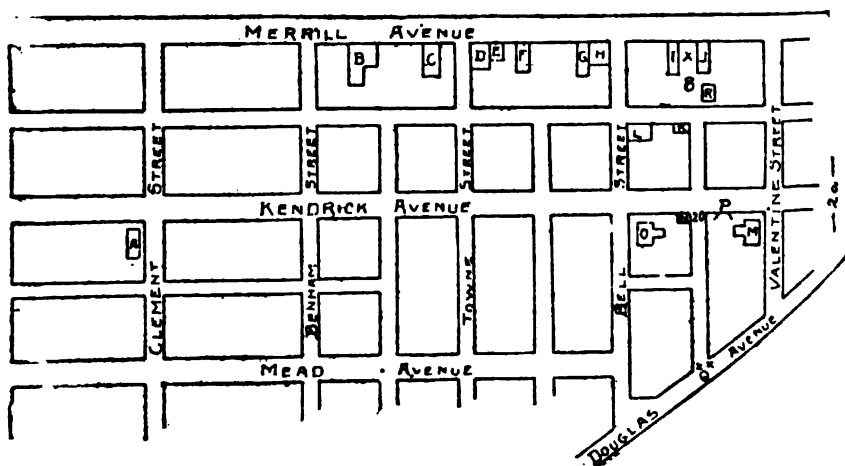
MR. CHIEF JUSTICE BRANTLY delivered the opinion of the Court.

The defendant was convicted of murder in the first degree on March 21, 1899, and on the following day was sentenced to suffer the death penalty. A motion for a new trial was denied on June 10, 1899. The appeal is from the judgment and the order denying a new trial.

The grounds relied upon for a reversal of the judgment and order are insufficiency of the evidence to sustain the verdict, errors of the trial court in rulings upon the admission and

exclusion of evidence and in a refusal to properly instruct the jury, and misconduct of the counsel for the state which was prejudicial to the defendant.

The record discloses these facts: Dominick Cavanaugh, the deceased, was the sheriff of Dawson county. At the general election held on November 8, 1898, he was a candidate for re-election, and was successful. The defendant was also a candidate upon the opposition ticket. The deceased had his office and resided with his family in the court house building in Glendive, the county seat. The subjoined diagram of a part of the townsite of Glendive shows the place of the homicide and the other points referred to in the proof.



- | | |
|-----------------------------------|---|
| A Hurst residence. | K Duncan cottage, residence of Steele. |
| B Yellowstone Hotel. | L Duncan block and office. |
| C M. Cain, saloon. | M Dr. Hunt's residence. |
| D Douglas & Mead, bank and store. | N Cavanaugh's barn. |
| E Agnew & Gilles, barber shop. | O Court house. |
| F Foster's bakery. | P Side gates Hunt's residence. |
| G Drug store where fair was held. | Q Where Myers Bros. stood on night of murder. |
| H Masonic Block. | R Wood pile. |
| I Postoffice. | X Vacant lot, 50 feet wide. |
| J Lowry & Eaker, meat market. | |

The business portion of the town fronts on Merrill avenue. The court house fronts on Bell street at the point O. At N is a small stable appurtenant to the court house, and which was used by deceased. It opens back upon the alley, marked

“20,” by two doors, the larger of which is at the middle of the building. This alley is open from Douglas avenue to the back of block 8. Between I and J in block 8 is a vacant lot. This is made use of as a passageway by persons going from Merrill avenue by way of the alley toward Douglas avenue. From the stable to Merrill avenue by way of the alley and vacant lot is about 240 feet. Early on the morning of December 24, 1898, the dead body of Cavanaugh was found lying face downward diagonally across the alley, near the large door of the stable, the feet being toward the stable and the head toward Douglas avenue. The face was frozen in a pool of blood. The body was stiff. Near it was found the hat of deceased, and also a book, wrapped in Manilla paper. This book and a pair of cuff buttons he had purchased the previous evening at the store marked ‘F’ on Merrill avenue. The effects upon the body were undisturbed. Upon the scalp were eight or nine wounds, made by some blunt instrument, all of which penetrated the flesh and crashed through the tables of the skull into the brain. Upon the right side of the hat were found traces of iron rust and indentations resembling screw threads over a space of two inches. There was a corresponding wound on the right side of the head, showing the skull crushed in. Physicians examined the skull, and found it broken into 35 pieces, and they were of the opinion that the wounds had been inflicted by means of a heavy iron bolt. Each of the wounds was fatal. The last time the deceased was seen alive was about 8:24 o’clock on the previous evening. After buying the book and cuff buttons at F, he left there, saying he was in a hurry to reach home. He then went into the postoffice at I. After remaining there a few minutes, he left. The time is fixed by Miskimmen, the postmaster, at about 8:24. The deceased passed over the vacant lot between I and J, and within a few feet of the point R. At this point he recognized and spoke to Frank Gilmore, a witness for the state, but did not stop. Gilmore had just thrown off a load of wood, and was preparing to take his team home. The night was clear, and the moon was bright. At a distance of 30 or

35 feet behind deceased, and going at a somewhat faster pace, there followed another man, wearing a sack coat and hat, whom Gilmore recognized as the defendant. He is somewhat taller than was the deceased. He passed within 9 or 10 feet of the witness, but did not speak. He had his right hand in the pocket of his pantaloons or under his coat, so that the coat projected behind. As he passed on he seemed to be overtaking Cavanaugh. The witness then turned his team into Merrill avenue between I and J, and went along the avenue to the right. A short distance from J he passed the witnesses Steele and wife, who were going to their home at K. These latter passed along Merrill avenue to J, and then turned to the left to reach their home. As they came towards it, Mrs. Steele saw two men, one taller than the other, standing near the point P, apparently engaged in conversation. The presence of the men there at that hour was such a strange circumstance that she twice called her husband's attention to them. As these witnesses turned into their house, the two men started in the direction of the stable, the taller following the other. The witnesses then lost sight of them. Going into the house, Mrs. Steele lighted the lamp. It was then 8:25 o'clock. The residence of Dr. Hunt is at M. On this evening he and his wife had walked up to a drug store at G, and had returned home about 8:20. A minute or two later a patient called and obtained a prescription. While engaged in writing the prescription, and between 8:20 and 8:35, Dr. Hunt heard a sound in the direction of the Cavanaugh stable, described by him as a muffled voice sound mixed with other sound, all of which he supposed was made by some one at the stable. He called the attention of the patient to it, who stated that it was probably some "kids" in the alley. On the same evening, between 8 and 8:30 o'clock, John and Lawrence Myers were passing along Douglas avenue. At the point Q they heard twice in quick succession a sound described by one of them as a "kind of a holler like a body holding their hand over their mouth hollering." One of them says it was the sound of a muffled voice. The sound was in the direction of the Cavanaugh sta-

ble, and, looking in that direction, they saw the form of a medium-sized man, slightly stooped, walking rapidly away from the mouth of the alley at the stable into the street. He disappeared behind the stable along Kendrick avenue, and was not seen by them again. These witnesses could not describe the clothing of the man they saw. The distance he was from them was 60 or 75 yards. Though the moon was bright, they noticed nothing else in the alley.

Cavanagh had left his home at the court house a little after 7 o'clock, and had been in various places along Merrill avenue until he started from the postoffice on his return. The defendant had also been into various places along Merrill avenue during the evening. After making some purchases, he was seen going towards his home at A about 7:30. The proof shows he probably went home at that time to leave his purchases, and afterwards returned to Merrill avenue, for he was seen again going towards the postoffice at 8 o'clock. As Dr. Hunt and his wife went into the drug store at G a little before or after this time, the defendant was passing out. Dr. and Mrs. Hunt greeted him. He had a package under his arm, done up in light paper. It was as large as a quart bottle, and from 12 to 16 inches in length. Exactly at 8:30 the witness Agnew says that Hurst passed his barber shop at E, going in the direction of his home. At that time, though accosted by Agnew, he made no reply, but passed on in silence. He had no package. There is a sharp conflict in the evidence as to the dress worn by defendant, but there is evidence tending to show that he had on a sack coat of brown duck, overalls, and a dark hat. Another witness saw defendant a moment after Agnew saw him; he was then still going toward home. Besides these instances, no other witness saw defendant during the time after 8 o'clock, except Gilmore, as before stated.

Defendant's wife was upon the stand, but she made no statement as to defendant's movements during that evening, nor as to the clothing he wore. Several days after the homicide a search was made of defendant's house. A pair of over-

alls were found, hanging in a closet; they were over a pair of dark pantaloons. In the pockets of the pantaloons were found two handkerchiefs. Upon the overalls and one of the handkerchiefs were found bloodstains. On the morning the body was discovered, and while a number of people were assembled at the court house, where the body lay, the witness Gilmore met the defendant at a point on Bell street, from which they could see the people at the court house, and spoke to defendant about the murder. Defendant appeared nervous, and looked several times toward the court house. He said nothing of the death of Cavanaugh, but began at once to speak about getting some one to call for a dance to come off a few nights afterwards.

On several occasions a short time before the murder the defendant was heard to make threats against deceased, apparently prompted by hostile feelings aroused by their political contest and defendant's defeat. On the evening of the day of election he was overheard by the witness Nellie Ward talking with another person. She was passing from the court house, where she had been to take supper to the judges of election, to the building at G, which was not then occupied by any business. On that evening the women of the Catholic church held a fair there. It was about 6:30 o'clock, and dark; and as she passed the alley in the rear of this building she heard a part of the conversation, as follows: The strange voice said that "Dominick would get it." A voice, which she recognized as defendant's, replied that "If the s— of a b— did, he would never see the new year." She saw the men, but did not recognize either by sight. On the night after election, in speaking of the result, the defendant told the witness Bonney that Cavanaugh had done him dirt, and that he would "fix him." Three or four days later, in speaking of the election to the witness Schwanke, and in reply to an inquiry by Schwanke as to how he felt over it, he said, "I would have been elected, but he played me dirty tricks; but I will get even with him." On the next day after the murder the defendant began to lay his plans to be appointed to the office of sheriff as the successor of Cavanaugh.

The foregoing is a brief statement of the salient parts of the evidence. We have made no attempt to set out a complete analysis of it, nor shall we. The jury having found all these facts established beyond a reasonable doubt, as they must have done, they were led irresistibly to the conclusion that the defendant is guilty of the murder of Cavanaugh. We have given our attention carefully and patiently to the examination of the whole of the evidence, and we cannot say that the result reached by the jury is not justified by it, or that there is, upon the whole of the evidence, a reasonable doubt of the defendant's guilt. Counsel for defendant predicates his main attack on the verdict upon the assertion that the only evidence in the record tending to connect the defendant with the crime is that of the witness Frank Gilmore; that the identification of the defendant by this witness as the man who followed the deceased along the alley a few minutes before the homicide, is unsatisfactory at best; and that, in addition to this, the witness was shown to have made so many contradictory statements about the matter that he should not be believed. It is true that this witness had been examined at the coroner's inquest and at the preliminary examination, and that he was shown to have been evasive and contradictory in his statements at these times. It was further shown that he had been evasive and contradictory in speaking of the matter on other occasions. At the trial, however, his identification of the defendant was clear and positive. He also explained his previous inconsistent statements by telling the jury that he was at first reluctant to tell what he knew about the case, and thus to be the instrument of bringing condemnation upon the defendant, whom he looked upon as a friend, and as not capable of committing such a crime; but that, after a struggle with his conscience, he had determined that it was his duty to tell the facts, and let the law take its course. He also stated, in substance, that many persons had questioned him about the case, whom he deemed to be prompted by curiosity or, perhaps, less worthy motives, and that he did not think he was bound to gratify

them by stating the facts to them. The jury heard the whole of his statement and the contradictory evidence. They saw him, and had an opportunity to observe his manner upon the stand. His credibility and the effect which was to be given his evidence were clearly for the jury to determine. They were fully instructed as to their power and duty in weighing the evidence, and this Court cannot say that they abused their power or disregarded their duty. Moreover, the trial judge saw and heard this witness testify. It was within his province if not satisfied with the verdict, to set it aside and grant a new trial. This he refused to do. We cannot say that he abused his discretion. This Court cannot try the case *de novo* and thus invade the province of the trial court by passing upon disputed questions of fact and the credibility of witnesses.

Counsel contends further that the evidence shows that the defendant was upon Merrill avenue, at the barber shop at F, at 8:30 o'clock and that, therefore, he could not have been present at the scene of the homicide at the time it occurred. The whereabouts of the defendant at the time of the homicide was a controverted fact, and the finding of the jury thereon cannot be disturbed. Besides, admitting that he was seen at 8:30 o'clock on the street near the barber shop, going in the direction of his home, this fact does not show that the finding of the jury was wrong. Under the evidence on this point the distance from the scene of the crime to that point could be covered by a person walking rapidly in two or three minutes. The proof also shows that the homicide must have occurred not more than a minute or two after 8:25. The defendant could, therefore, have committed the crime, and then have gone to the barber shop on Merrill avenue afterwards.

2. In testifying to the threat which she heard defendant make against the deceased on the evening of election day in November, the witness Nellie Ward, stated in reply to a question by defendant's counsel, that she could not be mistaken in the voice of defendant. In rebuttal defendant called Dustin Gibson. After stating that he had had a speaking acquaint-

ance with Nellie Ward for a long time, and that he had met her one evening, after dark, the fall before, at the house of one Mrs. Schick, the witness was asked: "Now, I will ask you Mr. Gibson, if she did not, not seeing you, but from the tone of your voice, mistake you for Mr. Voorhies?" Upon objection the court refused to permit him to answer, on the ground that the evidence thus sought was incompetent. This ruling is assigned as error. Evidently the idea in the mind of counsel was that, if the witness Nellie Ward had made a mistake in identifying Gibson by his voice, she might also have been mistaken in her identification of the defendant. The purpose, therefore, was not to contradict this witness, as counsel stated, but to prove a fact from which the jury might infer that her observation was at fault. The answer to the question could not have shown any statement made by Nellie Ward at that time inconsistent with her opinion or conclusion as stated by her when upon the stand. It was, therefore, not competent for this purpose, as claimed by counsel. Nor do we think the mere fact that the witness made a mistake in the voice of Gibson at that time was competent as tending in any way to show that her observation was at fault at another time, and under conditions which may have been altogether different. The principle involved is somewhat analogous to that which permits proof, in certain cases, of experiments made for the purpose of showing that a person could or could not see or do something which he claims that he saw or did. "Under some circumstances this class of testimony may be very satisfactory, but, unless the experiments are shown to have been made under essentially the same conditions, the tendency is to confuse and mislead, rather than enlighten, the jury." (*Lake Erie & W. Railway Co. v. Mugg*, 132 Ind. 168, 31 N. E. 564.) This case is approved in *Burg v. Chicago, etc., Railway Co.*, 90 Iowa 106, 57 N. W. 680, and the same rule is followed by other courts. (*Wilson v. State* (Tex. Cr. App.) 36 S. W. 587; *Chicago & A. Railroad Co. v. Legg*, 32 Ill. App. 218; *Elgin J. & E. Railway Co. v. Reese*, 70 Ill. App. 463; *Byers v. Railroad Co.*, 94 Tenn. 345, 29 S. W.

128.) Counsel made no offer to show that the conditions existing at the time the mistake was made in recognizing Gibson were in any degree similar to those existing at the time in question. Assuming that the evidence would have been competent had the offer been so made as to bring it within the principle of these cases, the trial court committed no error in rejecting it as offered. Whether, if Nellie Ward's attention had been called to the occurrence at Mrs. Schick's, and she had denied it, it would have been competent to contradict her, we do not decide, as the question does not arise.

3. The witness Gilmore, upon cross-examination by defendant's counsel, stated that on the day after the homicide, and at the barn where he and Dustin Gibson kept their horses, he had told the latter that the man he saw following Cavanaugh was the defendant. On redirect examination he gave the details of the conversation, and stated further that it was agreed between him and Dustin Gibson that they would say nothing of the matter to any person. Gibson, called by the defense to impeach Gilmore, denied that the conversation had occurred as Gilmore asserted, and stated that Gilmore had not told him that he recognized the defendant as the man following deceased on the evening of the homicide. He also stated that Gilmore had not mentioned the defendant in any way in connection with the murder until about the middle of the following week, and after Gilmore had been examined as a witness at the inquest. He then left the witness stand, but was recalled to impeach Nellie Ward's testimony. This part of his testimony was excluded, as already noted. The court at this time, over the objection of defendant, allowed counsel for the state to cross-examine him, to lay the foundation for impeachment as to a conversation had with one George Schnick on the 26th or 27th of December after the murder, in which he told Schnick that Gilmore claimed that Hurst was the guilty party, but that Schnick should say nothing about it. Counsel contends that the evidence brought out was immaterial, and that the ruling was error. Counsel is clearly wrong. It was important for the state to contradict Dustin Gibson by show-

ing that he had knowledge at that time that Gilmore asserted that Hurst was the guilty man, and that he had gained this knowledge from Gilmore,—facts entirely inconsistent with the statement made by him upon the stand, and materially corroborative of Gilmore's testimony.

Counsel say that the court erred in permitting any cross-examination of this witness, because he was not permitted to testify to anything in chief, and his cross-examination related to matters wholly foreign to the subject upon which he had been questioned by the defense. This is true. But while he was on the stand counsel for the state desired to lay the foundation for impeachment by asking about the statements mentioned. They would have been permitted to recall him for this purpose at any time. It was a matter entirely within the discretion of the court. There was no error in the ruling.

4. At this time the witness Gibson was also asked if he did not, during the coroner's inquest, and while he was upon the stand as a witness, state, in presence of Burdick, the coroner, and others there present, that Gilmore had told him on the 24th or 25th of December that Hurst was the man he saw following deceased down the alley. He answered in the negative. Burdick was afterwards called to contradict him. The question put to Burdick did not refer to the time during which Gibson was on the stand, but to a time just after he had finished his testimony. Objection was made that the foundation had not been properly laid for the impeachment, because the question referred to a different time from that to which Gibson's attention had been called. The court overruled the objection, and defendant excepted. Burdick directly contradicted Gibson. The question put to Gibson sufficiently met the requirements of Section 3380 of the Code of Civil Procedure touching the circumstances of time, place and persons present, to notify him of the statement referred to and to which Burdick testified. The objection was extremely technical. There was no error in disregarding it.

5. Error is assigned upon the refusal by the court to give instruction No. 13 requested by the defendant, as follows:

“If, after consideration of the whole case, any juror should entertain any reasonable doubt of the guilt of the defendant it is the duty of such juror so entertaining such doubt not to vote for a verdict of guilty, nor to be influenced in so voting for the single reason that a majority of the jury should be in favor of a verdict of guilty.” The propriety of giving this instruction was considered in *People v. Dole*, 122 Cal. 486, 55 Pac. 581, the court saying of it: “This is a correct statement of the duty of a juror, and should have been given. If any juror needed an instruction upon this point, it was harmful to refuse it; if no juror needed the instruction, it would have been harmless to give it.” An examination of the record in this case shows that the court carefully instructed the jury as to their duties in instructions Nos. 9, 13, 17, and 38. We agree that the instruction as asked is a correct statement of the law as to the duty of a juror, but we also think that the general instructions submitted in this case were amply sufficient to guide the individual jurors in the performance of their duties under the law. The court had heard the individual jurors examined. It had witnessed their behavior during the progress of the trial. It was discretionary with the court to instruct the jury more specifically with reference to their individual duties, the exercise of this discretion to be determined by the observations made by the court during the examination of the jurors and their conduct during the trial. If the court thought proper to give the instruction, it was proper to give it. On the other hand, if the court thought the jury did not require the instruction, it was not abuse of discretion to refuse to give it. There is some conflict of authority as to whether the court should instruct the jury in matters of this kind. We agree in the main with what the Supreme Court of Iowa said on the subject of such instructions in *State v. Hamilton*, 57 Iowa, 596, 11 N. W. 5: “Of course, each juror is to act upon his own judgment. He is not required to surrender his convictions unless convinced. He may be aided by his fellow jurors in arriving at the truth, but he is not to find a verdict against

his judgment merely because the others entertain views different from his own. But a jury need not be advised of so simple a proposition. The usual method of instructing upon the measure of proof required in criminal cases is sufficient."

6. Complaint is made that counsel for the state, during the argument to the jury, were guilty of misconduct prejudicial to the defendant, in that they went outside of the record, and stated matters of fact to the jury. The record fails to show in any authentic form what counsel did say. True, it appears that counsel for defendant several times interrupted the argument of counsel for the state to interpose objections to statements claimed to be not warranted by the proof, but the objectionable statements were not taken down, nor was a formal ruling of the court obtained, and exception saved. However objectionable the statements of prosecuting counsel may be, this Court cannot consider them, nor review the action of the trial court thereon, unless they, with the ruling of the court thereon, are preserved in a bill of exceptions, and properly certified. The rule was stated by this Court in *State v. Biggerstaff*, 17 Mont. 510, 43 Pac. 709, as follows: "We think the great weight of authority is to the effect that, in order to bring the language complained of before this Court for review, it was necessary for the defendant to request and secure a ruling of the court thereon, and properly save an exception to such ruling in a bill of exceptions. The bill of exceptions in the case presents no such record or action of the court as to authorize us to pass upon the language of the county attorney. It was never properly raised and passed upon by the lower court. It cannot be raised here for the first time." (See, also, *State v. Cadotte*, 17 Mont. 315, 42 Pac. 857.)

There being no error in the record, the judgment of the district court and the order denying the motion for a new trial are affirmed.

Affirmed.

STATE, RESPONDENT, v. ANACONDA COPPER MINING
CO., APPELLANT.

[No. 1,451.]

[Submitted January 8, 1900. Decided January 29, 1900.]

*Constitution—Statutes—Validity—Expression of Subject in
Title—Criminal Law—Evidence.*

1. By Sec. 23, Art. V, of the Constitution, it is only intended that the subject of a bill shall be fairly expressed in the title; it is not necessary that a title shall embody the exact limitations or qualifications contained in the bill itself which are germane to the purpose of the legislature, if the general subject of the measure is clearly expressed in the title.
2. Laws of 1897, p. 245, entitled "An act to amend Section 705 of Title X, of the Penal Code of the state of Montana, to have the cages in all mines cased in," makes it unlawful for any corporation to sink or work through any vertical shaft where mining cages are used to a greater depth than 300 feet, unless such shaft shall be provided with an iron-bonneted safety cage. *Held*, that the subject-matter of the act is sufficiently expressed in the title, within the meaning of Constitution, Art. V, Sec. 23.
3. In a prosecution for violation of the Laws of 1897, p. 245, making it unlawful for a corporation to work through a vertical shaft where mining cages are used to a greater depth than 300 feet, unless the cage shall be provided with an iron-bonneted safety cage, evidence that such devices or cages would be dangerous is inadmissible, since the question whether such appliances were the best or wisest method is for the legislature to decide.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

THE Anaconda Copper Mining Company, convicted of violation of the act requiring cages of all mines to be cased in, appeals. Affirmed.

Mr. J. K. MacDonald, for Appellant.

Defendant contends that the title of the amendatory act in question fails to state the object of the act, which was to have cased in the cages of those mines whose shafts were sunk below 300 feet. The title, therefore, which describes the act as one to have the cages of all mines cased in, fails to state its object. Although it may not be obvious that the passage of the bill was aided by this deception, it is sufficient to say that

our constitution has not been followed in this particular, when it provides that "no bill except general appropriation bills, and bills for the codification or general revision of laws, shall be passed containing more than one subject, which shall be clearly expressed in its title." * * * (Constitution of Montana, Art. V, Sec. 23; see *Coutieri v. New Brunswick*, 44 N. J. Law, 58; *City of Beverly v. Walm*, 57 N. J. Law, 143; *State v. Howell*, 60 N. J. Law, 384; Sutherland on Stat. Const. Sec. 90, p. 99; *Durkee v. City of Janesville*, 26 Wis. 697; *People v. Allen*, 42 N. Y. 404; *State v. Mitchell*, 17 Mont. p. 76; Dissenting opinion of Ch. J. Church in *Nenendorff v. Duryea*, 69 N. Y. 557; 23 Am. & Eng. Ency Law, p. 232; *In re Haynes*, 22 Atl. Rep. p. 923.) The court erred in excluding the evidence offered by the defendant to show that the devices called for by said amendatory act would not tend to promote the safety of those using the cages to which they were attached, but that, on the contrary, such devices would be dangerous and liable to result in accident. (Tiedeman on Limitations of Police Powers, Sec. 1, p. 4 and authorities cited; *Id.* Sec. 3, pp. 10-13; *Bertholf v. O'Reilly*, 74 N. Y. 509; Black on Const. Law, p. 325; *Mugler v. Kansas*, 123 U. S. 663; Thompson on Electricity, p. 2; *Toledo, etc. R. Co. v. City of Jacksonville*, 16 Am. Rep. 612, 67 Ill. 37; Cooley on Const. Lim. p. 710; *In re Jacobs*, 98 N. Y. 98; *Electric Imp. Co. v. San Francisco*, 45 Fed. 593; *Health Dept. of New York v. Rector, Etc.*, 17 N. Y. S. 510.)

Mr. C. B. Nolan, Attorney General, for the State.

MR. JUSTICE HUNT delivered the opinion of the Court.

Conviction for violation of Section 705 of the Penal Code, as amended by an act of the Fifth legislative assembly entitled "An act to amend Section 705 of Title X of the Penal Code of the State of Montana, to have the cages in all mines cased in." (Laws of 1897, p. 245.) After a jury was impaneled and sworn to try the case, defendant moved that it be discharged, upon the ground that the amendatory act cited

above is unconstitutional, for the reason that the subject thereof is not clearly expressed in its title. This motion was overruled, and defendant duly excepted. Thereupon the state introduced evidence to sustain the charge. After the state rested, defendant sought to prove that the devices called for by the provisions of the amendatory act would not tend to promote the safety of those using the cages to which they were attached, but that, on the contrary, such devices would be dangerous, and likely to result in accident. To this offer of evidence the state, by its counsel, objected, and the court sustained the objection. Defendant duly excepted. The jury convicted the defendant, and from a judgment imposing a fine of \$300 defendant appeals.

The amendatory act, following the original section (705) of the Penal Code, makes it unlawful for "any corporation * * * to sink or work, through any vertical shaft where mining cages are used, to a greater depth than *three hundred feet*, unless said shaft shall be provided with an iron bonneted safety cage."

The most significant change between the original provision of the Code and the statute as amended is that the latter requires cages to be cased in with sheet iron, or steel, or wire netting, and to have doors of the same material, to be hung on hinges or made to slide, and to be at least five feet high from the bottom of the cage; whereas the original statute was silent concerning any such method of construction, thus leaving it optional with the mine operator to encase his cages or not, as he pleased. Evidently, therefore, it was to remove any choice in the matter, and to compel the mine operator to adopt an inclosed cage, that the amendment of 1897, *supra*, was enacted.

Is the subject contained in the amended bill clearly expressed in the title, as required by Section 23, Art. V, of the State Constitution?

The purposes of the clause of the constitutional mandate that the subject of a bill shall be clearly expressed in its title have been considered and defined by this Court in *State v.*

Mitchell, 17 Mont. 67, 42 Pac. 100; *Jobb v. Meagher Co.*, 20 Mont. 424, 51 Pac. 1034, and the authorities cited in these cases. Briefly summarized, they are: to restrict the legislature to the enactment of laws the objects of which legislators and the public as well may be advised of, to the end that any who are interested, whether as representatives or those represented, may be intelligently watchful of the course of the pending bill. The limitation is likewise designed to prevent legislators and the people from being misled by false or deceptive titles, and to guard against fraud in legislation by way of incorporating into a law provisions concerning which neither legislators nor the public have had any intimation through the title read or published. (*Com. v. Brown* (Va.), 21 S. E. 357, 28 L. R. A. 110.)

But by this constitutional notice it is only intended that the subject of the bill shall be fairly expressed in the title. It is not necessary—for the constitution has not so declared—that a title shall embody the exact limitations or qualifications contained in the bill itself which are germane to the purpose of the legislature, if the general subject of the measure is clearly expressed in the title. Upon the highest authority it is held that, under constitutional provisions substantially like that referred to in Montana, where the degree of particularity necessary to be expressed in the title of a bill is not indicated by the constitution itself, the courts ought not to “embarrass legislation by technical interpretations based upon mere form or phraseology. The objections should be grave, and the conflict between the statute and the constitution palpable, before the judiciary should disregard a legislative enactment upon the sole ground that it embraced more than one object, or, if but one object, that it was not sufficiently expressed by the title.” (*Montclair v. Ramsdell*, 107 U. S. 155, 2 Sup. Ct. 391, 27 L. Ed. 431; *Powell v. Supervisors of Brunswick County*, 88 Va. 707, 14 S. E. 543.)

In harmony with these sound principles of the construction of like constitutional limitations, we are of opinion that appellant’s point is not well taken. We fail to see in the title

of this amending bill any substantial departure from the constitutional requirement. That the bill itself contained but one subject is obvious—in fact, we do not understand appellant to contend otherwise. That that one subject, however, is clearly expressed in the bill is disputed, but not convincingly so. The title specifically refers to the section of the Penal Code to be amended, and adds thereto, “to have the cages in all mines cased in.” The law itself requires cages in all mines to be cased in if cages are used, and if the mines are worked through vertical shafts to a greater depth than 300 feet. It follows that, in mines not operated through vertical shafts over 300 feet in depth, cages, if used, need not be such as the law specifies. The law presupposes such a development as leads to the use of cages, and then only undertakes the regulations prescribed.

Now, what was the underlying object of this legislation? Plainly to better protect the lives and limbs of miners working in developed mines where such development or operation is through vertical shafts in mines where cages are used. There must be a reasonably extensive development, 300 feet in depth, before the appliances specified need be used at all; but, when such development is had, the law becomes uniform in its operation by requiring that in vertical shafts in all mines so developed where cages are used the cages must be cased in and covered in a certain way. The legislature, in its wisdom, apparently deemed it unnecessary to require such extraordinary protection in properties where the shafts, though vertical, are less than 300 feet deep; and we do not assume more than a common knowledge of mining when we state it as a fact, generally known, that in Montana few mining properties operated through vertical shafts are classified by miners as “mines” to be systematically worked until the development exceeds 300 feet. Clearly it was never meant to create a statute that would in the least retard the development of prospects by demanding expensive and elaborate means of protection, unnecessary while prospecting or shallow mining only was going on.

As stated, the aim of the legislature was to insure a proper protection for miners where a prospect has opened into a "mine" in which deep mining is to be carried on, and the enterprise has taken on some degree of permanency of operation, for, obviously, it is in deep mining that the protection is most needed.

Though the words of the title, "to have the cages in all mines cased in," are general, they give clear notice to the operators of all mines where cages are used that their properties might be affected by the law. There was no deception by design or accident, and we cannot see how, on the one hand, any mine owner operating a mine where cages are used could fairly say that he was misled, or, on the other, a mine owner not using cages at all in his mine could have been deceived by the title.

There is, therefore, really no objection to the law other than that the title is somewhat broader than the bill itself. The effect of the comprehensiveness, however, is not reasonably to mislead or deceive. A better title than the one given—a more limited title—could be suggested; still we think, under the doctrines of construction already invoked, the subject contained in the law is expressed by the title used with sufficient clearness to remove the act from within the mischief which the constitution says shall be avoided. It follows that the courts cannot hold the law unconstitutional. In line with our views we cite: *Neuendorff v. Duryea*, 69 N. Y. 557; *State v. Trolson*, 21 Nev. 419, 32 Pac. 930; *State v. Miller*, 45 Mo. 495; Sutherland on St. Const. Sec. 97; Cooley's Const. Lim. p. 170 *et seq.*; *Allegheny Co. Home's Appeal*, 77 Pa. St. 77; *State v. Becker*, 3 S. Dak. 29, 51 N. W. 1018; *In the Matter of Petition of Mayer*, 50 N. Y. 504; *Luther v. Saylor*, 8 Mo. App. 424.

The contention that the court erred in excluding evidence offered to show that the devices or cages required by the amended law would be dangerous, and apt to result in accidents, must fall also. The text of the law discloses a measure designed to guard against the dangers incident to lowering

and elevating men in deep mining shafts. Whether the cased-in cage and its appliances is the best or wisest method was a question for the legislature to decide. Laws regulating the construction and operation of elevators are frequently enacted as a proper exercise of the police power of the state. The legislature is the branch of the government which exercises this power, and, unless there be constitutional limitations upon it, as a rule the judicial power cannot set aside a law passed in the exercise of it. This proposition is fundamental. Whether the courts may nullify the judgment of the legislature upon the ground that some great principle of natural right has been subverted is a question not before us, for a law requiring mining cages to be covered and cased in does not present an instance of "natural injustice" which authorizes the interposition of the courts, even could there be any such interposition under the guaranty that no man shall be deprived of life, liberty, or property without due process of law.

The judgment is affirmed.

Affirmed.

STATE, RESPONDENT, v. CALDER, APPELLANT.

[No. 1,431.]

[Submitted January 8, 1900. Decided January 29, 1900.]

Criminal Law—Homicide—Information—Indorsement of the Names of Witnesses—Evidence—Corpus Delicti—Testimony of Accomplice—Sufficiency of Corroboration—Instructions—Degrees of Murder—Circumstantial Evidence.

1. Under Penal Code of 1895, Sec. 1734, requiring the county attorney to indorse on the information, at the time of its filing, the names of the witnesses then known to him, where the name of a witness known to the county attorney at the filing of the information was omitted, but there was no evidence of bad faith, the court properly permitted it to be indorsed on the day before trial.
2. On a trial for murder, the identity of the person alleged to have been killed was proved by direct evidence of an accomplice, who was an eyewitness, and assisted in disposing of the body by burning it and throwing the ashes in a river, corroborated by circumstantial evidence. The death of a human being was directly proved, by the identification of certain teeth and charred bones found in a river near the point

23	504
123	525
123	546
23	547
23	504
24	304

23	504
26	56
26	58
26	835

23	504
35	544

23	504
138	338

where the body was burned, and there was circumstantial evidence to prove the identity of the deceased. *Held*, that the evidence was sufficient to satisfy the requirements of Penal Code, Sec. 358, that the "death" of the person alleged to have been killed must be established by "direct proof," as an independent fact, and of Code of Civil Procedure, Sec. 3108, defining "direct proof" as that which proves the fact in dispute, without an inference or presumption.

3. In prosecutions for murder, proof of the *corpus delicti* involves the establishment of the fact that a murder has been committed, but includes neither the identity of the person alleged to have been killed, nor the killing by the person accused.
4. Under Penal Code, Sec. 2089, requiring an accomplice to be corroborated by other evidence which of itself tends to connect the defendant with the crime, it is not essential that the evidence in corroboration must be sufficient, when standing alone, to connect the defendant with the crime, but it is sufficient if it tends so to do.
5. The court is not bound to charge upon murder in the second degree, or upon a lower grade of homicide, when there is no evidence, direct or circumstantial, to which the instruction could apply.
6. On a trial for murder, the refusal to charge specifically as to the burden of proof resting on the state to establish beyond reasonable doubt the existence of each link in the chain of circumstantial evidence was not error, where there was direct evidence of the main fact, and the indirect evidence was merely in corroboration.

Appeal from District Court, Fergus County; Dudley Du Bose, Judge.

WILLIAM WALLACE CALDER was convicted of murder. From an order denying a new trial he appeals. Affirmed.

Mr. Wm. E. Cort and Mr. O. F. Goddard, for Appellant.

Mr. C. B. Nolan, Attorney General, for the State.

MR. JUSTICE PIGOTT delivered the opinion of the Court.

William Wallace Calder was tried upon an information charging him with the murder of one Farquhar MacRae on the 24th day of September, 1898, at the county of Fergus. The jury having found him guilty of murder in the first degree, as charged, he was sentenced to be hanged. Upon the 25th day of May, 1899, his motion for a new trial was denied, and he appeals.

1. The first specification of error is directed to the action of the district court in permitting the county attorney, on the day next before the beginning of the trial, to indorse upon the information the name of one James Calder, an important witness for the state. To the request for leave to indorse the name of this witness, the defendant objected, but the objec-

tion was overruled, and the name indorsed, the defendant excepting. At the common law the names of the witnesses are not required to appear upon the indictment or information. It is only by virtue of the statutes that such necessity exists. Section 1813 of the Penal Code provides that the names of the witnesses examined before the grand jury must be inserted at the foot of the indictment, or indorsed thereon, before the indictment is presented to the court, but that a motion to set it aside, interposed under Section 1910 of the Penal Code, shall be denied if the names be indorsed prior to the disposition of the motion. Under the statute as it existed from 1891 to July 1, 1895, the prosecuting attorney was commanded to indorse upon the information, at the time of its filing, the names of the witnesses then known to him, "and at such time before the trial of any case, as the court may, by rule or otherwise, prescribe, he shall also indorse thereon the names of such other witnesses as shall then be known to him. (Laws of 1891, p. 250, Sec. 3.) Section 1734 of the Penal Code of 1895, which is the law applicable to the present case, differs from the statute of 1891 only in this, that Section 1734 omits the provision contained in the former statute requiring the names of witnesses discovered after the filing to be indorsed upon the information, and, of course, necessity does not now exist for the indorsement of the names of witnesses discovered subsequently to the filing; but the requirement that the names of witnesses for the state then known to the attorney prosecuting must be indorsed upon the information at the time it is filed is common to both. It is manifest, therefore, that neither by the statute of 1891 nor by Section 1734 is there expressly given to or recognized in the court the privilege of permitting the names of witnesses known when the information was filed to be indorsed thereafter. In *State v. Black*, 15 Mont., at pages 151 and 152, 38 Pac. 676, 677,—decided under the statute of 1891,—it was held, in substance, that the trial court did not err in permitting the name of such witness to be indorsed at the opening of the trial. This rule we affirm, and apply to the

case at bar. The purpose sought to be accomplished by Section 1734 is apparent. It is to advise the defendant of the witnesses known at the time the information is filed,—and these are usually the most important,—whom the state intends to call against him, so that he may have opportunity to make inquiries in respect of the witnesses, and otherwise prepare himself for meeting their testimony. If the witnesses are then known to the county attorney, his duty is to indorse their names at the time the information is filed; such is the command addressed by the statute to that officer, but it does not attempt to limit the exercise of the court's discretion, or define the duty of the court. The contention of the defendant is that if the county attorney, even by inadvertence or mistake, omits from the information, when filed, the name of a witness then known to him, the name never can properly be indorsed, and the state must be deprived of the testimony which the witness would give had his name been indorsed. The contention is untenable, for the court may permit the indorsement to be made after the information is filed, as was held in *State v. Black, supra*. In the case at bar the objection to the granting of the leave asked was general, no ground being stated in its support; the transcript fails to disclose that a showing was made at the time that James Calder was known to be a material witness when the information was filed, although the witness, when testifying thereafter, incidentally stated that he had imparted to the county attorney the facts touching the defendant's connection with the murder. But, for aught that appeared when the objection was interposed, the witness was not known to the county attorney at the time the information was filed, and for this reason the objection was properly overruled. Every reasonable intendment is in favor of the action of the trial court; the burden of establishing error is upon him who assails the ruling; and, since the court might with propriety permit the indorsement to be made after the filing, the presumption is conclusive, in the absence of proof to the contrary, that its action was correct. It is argued that the uncontradicted assertion of the witness

made during the trial ought to have been accepted by the court as proof of such knowledge by the county attorney; but, conceding this, either of two answers is sufficient: First, the proof should have been adduced at the time of the objection; secondly, no effort was made to show that the name of the witness had been purposely withheld from the information. We express no opinion in respect to the right course for the court to take where it appears that the omission of the indorsement at the time of filing was in bad faith; but we do hold that in all other cases the court should permit the indorsement upon the information of the names of witnesses who were known to the county attorney at the time it was filed, and in such cases the defendant would be entitled, upon timely application and showing, to a reasonable delay of the hearing to enable him to meet the testimony of the witnesses whose names were put upon the information after it had been filed. In the present case, however, no application or showing whatever was made. These views are, in part, at least, supported inferentially or directly by *State v. Cook*, 30 Kan. 82, 1 Pac. 32; *State v. Bokien*, 14 Wash. 411, 44 Pac. 880; and *State v. Black*, *supra*. The first specification is without merit.

2. The principal points made by the defendant are that the death of MacRae was not sufficiently proved by direct evidence, and that the evidence, aside from the testimony of the accomplice, did not tend to connect the defendant with the commission of the offense. He insists there was no evidence which, without the aid of the testimony of the accomplice, tended to prove guilt. It is argued that the *corpus delicti* was not established, and that the evidence in corroboration of the accomplice was not of such character and force as to warrant the submission of the case to the jury.

Section 3108 of the Code of Civil Procedure defines "direct evidence" as "that which proves the fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively establishes that fact. For example, if the fact in dispute be an agreement, the evidence of a witness

who was present and witnessed the making of it, is direct." Section 358 of the Penal Code provides that "no person can be convicted of murder or manslaughter unless the death of the person alleged to have been killed, and the fact of the killing by the defendant as alleged, are established as independent facts; the former by direct proof and the latter beyond a reasonable doubt." Section 2089 of the Penal Code is as follows: "A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient, if it merely shows the commission of the offense, or the circumstances thereof."

We assume, as did the attorney general in his brief and argument, that James Calder was unquestionably a confederate of the defendant in committing the murder of which the latter was accused. James Calder, a brother to the defendant, and an accomplice in the crime of which the defendant was convicted, was the principal witness for the state. His story is, in brief, the following: The defendant, aged 25, and the witness, aged 19, lived with their mother and stepfather, Smith, on Flatwillow creek, in Fergus county, about 16 miles from the Musselshell river. One James Eli Fisher, aged 21 or 22, was visiting the brothers. MacRae was a ranchman and had a flock of about 1,700 sheep, one-half of which belonged to one Hildebrand. In the employ of MacRae was a sheep herder named Allen. MacRae and Allen occupied a cabin distant $1\frac{1}{2}$ or 2 miles from the home of the defendant. The country thereabouts is sparsely populated, there being but four families in a radius of as many miles, and is but little traveled. On the afternoon of Saturday, September 24, 1898, the brothers and Fisher, armed with two guns, went hunting. After they had gone about a mile the defendant laid before his brother and Fisher "a scheme" to make money, and proposed that the three kill MacRae and Allen and steal the sheep, suggesting that their possession of

the sheep could be explained by saying that MacRae had hired them to drive the sheep away. The witness objected to becoming a party to the proposed crime, but was induced by threats of the defendant to aid in its commission. Immediately after the conspiracy was formed, the three started towards the ranch of one Lewis, which is about 2 miles from the MacRae cabin, at which ranch MacRae, not having a pasture of his own, had left his wagon and horses for a few days; on the way there they saw MacRae at a distance, alone with his sheep. When they were near the house of Lewis, the witness and Fisher stopped, while the defendant went into the house and talked with Lewis. Upon his return the three went immediately to MacRae, who was then about a mile from Lewis' ranch, and a like distance from the MacRae cabin. Fisher had one of the guns, and witness the other. They went close up to MacRae, and had a pleasant talk with him about the sheep, and asked him where he intended taking them. The three stood in a row, Fisher being next to the defendant, and the witness next to Fisher. The defendant was six feet from MacRae, and fronting him, seemingly waiting and watching for an opportunity to commit the murder while the eyes of MacRae were not upon his. The conversation lasted twenty or twenty-five minutes, and finally MacRae dropped his eyes and looked at his hands, in which he held a very small pocketknife and a little stick; then the defendant took the gun from Fisher and shot MacRae, who, in the graphic words of the witness, "had a word in his mouth when he was shot; I couldn't tell what it was; I know he had it in his mouth, because he was speaking it when he was shot; he made a noise that indicated to me that he was going to speak." Death was instantaneous. The blood from the body formed two pools. The defendant at once complained of the failure on the part of his companions to act, saying that they were "too slow," since he had desired and expected them to do the deed. The defendant searched the body, and took from it a silver watch, which, with its buckskin string, he appropriated to his own use, and wore until he was apprehended. MacRae

had also another knife, the importance of which fact will hereafter become apparent. Near the scene of the murder was a horse or pony of MacRae's; from it the witness, at the command of the defendant, took a quilt and a short rope, and, wrapping the former about the body, and attaching one end of the latter to the horn of the saddle, and the other to the feet of the corpse, he led the horse, and dragged the body a mile to MacRae's cabin. The pressure of the body upon the ground bent down the grass, and blood was visible in its wake; in the trail were left lint, fuzz, and fragments of the quilt. While the body of MacRae was being dragged, Fisher, with the same gun which had dispatched MacRae, killed Allen, who was about fifty feet in a direct line from the cabin. His body was also dragged in the same way as was MacRae's to the cabin; then both bodies were wrapped in tarpaulins taken from MacRae's cabin, and placed behind an adobe chimney. The sheep were then put into the corral, and the defendant and his associates went home. The next morning they returned to the cabin and chimney where the bodies had been deposited, and the defendant went to Lewis' ranch, and got the wagon and horses left there by MacRae. Into the wagon they put the food found in the cabin, and also a chest with iron handles, a shovel, and some other things of MacRae's. Then they put the bodies, still covered with tarpaulins, into the wagon. It was the intention of the defendant to sell the wethers at Forsyth, and ship the remainder of the flock after reaching the railway. In pursuance of this purpose they then began their wagon journey to the Musselshell river, on the afternoon of Sunday, September 25th, taking with them the sheep and three of MacRae's horses, and one belonging to the witness. On Monday afternoon, September 26th, the Musselshell river was reached; on the bank of the river, and five or six feet from the brink, they built a great fire of logs to burn the bodies, and placed them, together with the chest and its contents, taken from the cabin, upon the fire. The clothing worn by MacRae and Allen at the time they were killed had not been removed. From 2 o'clock to

12 o'clock midnight of that day the bodies burned, and the defendant and his companions from time to time replenished the fire. Daylight revealed only ashes and cinders. These the defendant and the witness cast into the river by means of the shovel taken from the MacRae cabin, leaving no apparent evidence of the fire, except the marks on the ground where it had been. The debris floated down on the surface of the stream a short distance, and was stopped by the still water in a hole. Commanded to do so by the defendant, the witness waded into the water and dislodged the cinders. They then proceeded on their journey, having first buried a tin box, a large knife, and a gun, which had also been taken from the cabin,—the difficulty of consuming these by fire being the reason they were buried, and not burned with the bodies and chest. Before reaching Forsyth, the defendant and his associates were captured by a *posse comitatus*. While in jail at Forsyth the defendant wrote a letter to the sheriff of Fergus county, which he delivered to the witness for that officer; the letter reached the sheriff, and is as follows:

“MILES CITY, Oct. 6, 1898.

“*Sheriff—Dear Sir:*

“Turn them boys loose; they haven't done anything.

“Yours truly,

“F. McRAE.”

Such, in brief, was the testimony of the accomplice; and unless he was corroborated to the extent required by Section 2089, *supra*, the defendant should have been acquitted. Although the practice at the common law is for the court to charge the jury to view the testimony of an accomplice with caution, and to advise an acquittal unless such testimony be corroborated in some material part by other evidence, yet these cautionary and advisory instructions may be given or withheld in the uncontrolled exercise of an arbitrary discretion. This rule of the common law rests upon the premise that the defendant may legally be convicted of crime upon the unsupported testimony of his accomplice,—the only exception to the rule seems to be a prosecution for perjury or its subor-

nation, as was declared in *People v. Evans*, 40 N. Y. 1. Section 2089, *supra*, in express terms requires the accomplice to be corroborated by evidence from an independent source which in itself tends to connect the defendant with the commission of the crime; it does not, unless by implication, require the production of such other evidence with respect to the *corpus delicti*, the identity of the person killed, or any other particular. But, whatever may be the true construction of the section, we shall in this case assume, without deciding or intimating any opinion upon the matter, that its spirit requires the accomplice to be corroborated by other evidence which in itself, and independently of his testimony, tends not only to connect the defendant with the commission of the offense, but also to prove the *corpus delicti* and establish the identity of the person slain. The *corpus delicti* is the body or substance of the offense; this means, and has always meant, the existence of the criminal fact. In prosecutions for murder, proof of the *corpus delicti* involves the establishment of the fact that a murder has been committed, but includes neither the identity of the person alleged to have been killed, nor the killing by the person accused. Evidence that a murder has been done, whether by the defendant or another, is proof of the body of the offense. Section 358, *supra*, declares, among other things, that no person may be convicted of murder or manslaughter unless the death of the person alleged to have been killed be established by direct proof. The testimony of the accomplice was direct evidence of MacRae's death. His testimony, however, was not, as we assume for the purposes of this case, of itself sufficient to establish it; corroboration in this particular, while necessary, need not have been other than by indirect or circumstantial evidence of the identity of the decedent and MacRae. The true meaning of the statute in this respect is that in the proof of the *corpus delicti* there must be direct evidence establishing the death of a person,—the fact that the decedent is the person alleged to have been killed may be proved by circumstantial evidence, that is, by inferences drawn from the facts proved; or it may, of course, be estab-

lished by direct proof; for example, direct proof that somebody is dead becomes direct proof that MacRae is dead whenever by indirect evidence the remains are shown to be MacRae's. (*People v. Palmer*, 109 N. Y. 110, 16 N. E. 529; *State v. Pepo*, 23 Mont. 473, 59 Pac. 721.) This was the rule at common law; and has not been modified by Section 358 *supra*. Again, the direct testimony of the accomplice to the alleged fact that MacRae is dead becomes sufficient proof of his death when the accomplice is corroborated by independent evidence, indirect though it be, which tends to establish such fact. In this case the *corpus delicti*, the identification of MacRae as the person slain, and the perpetration of the crime by the defendant, were proved by the direct evidence, if true, of an eyewitness. To sustain a conviction upon such testimony, that witness, being an accomplice, must have been corroborated. Was the corroboration sufficient?

Smith, the stepfather of the defendant, testified, among other things, to these matters: He last saw Allen on the 20th day of September, 1898; MacRae he saw and talked with at 10 o'clock on the morning of the 24th, and each then agreed to assist the other in building fences and in doing certain work. Since that time Smith has not seen MacRae, although on the afternoon of the next day the defendant told Smith that MacRae was alive, as will hereafter appear. When Smith last talked with MacRae, the latter was in the vicinity of his cabin. Early in the afternoon of the 24th the defendant, his brother James, and Fisher, left the Smith home, returning about dark. Next morning, the 25th, they went away at 7 o'clock, the defendant and Fisher carrying guns. The defendant at about 1 o'clock returned and got a bed, which witness helped him to pack upon his horse; the defendant saying that he was going hunting. At half past 2 or 3 o'clock in the afternoon Smith saw the defendant and his two companions, who were then about three miles from MacRae's cabin. They had a wagon and four horses, and were driving or leading the MacRae and Hildebrand sheep. The witness went towards the wagon, but the defendant and his brother left the wagon and went to meet

Smith. The defendant told Smith that he was leaving with MacRae's sheep; that MacRae intended stealing Hildebrand's sheep, and was to pay the defendant \$500 for assisting him in taking the sheep to Miles City. "When he spoke about he was to get \$500 to help MacRae take the sheep over to Miles City, I asked him where Mac was. He says, 'He is in the wagon,' he says. 'He don't want to show up here,' he says, 'until he gets away, because he don't want nobody to see him.' " The witness did not get to the wagon, but saw it distinctly, observing that a wagon sheet or tarpaulin extended from the hind end to the back of the seat, covering the bed. The defendant asked Smith to write to him at Miles City, addressing the letter to "Charles A. Brown." The brother produced a book, in which the defendant wrote the assumed name. Then the defendant and Smith had a private conversation aside, in which he requested Smith not to sign his name to any letter so addressed; the defendant saying that it would be better to omit the signature. The defendant and his associates then drove off in the direction of the Mussellsbell river. From these circumstances, Smith feared that all was not as it should be,—MacRae and he on the morning of the 24th having agreed upon a plan of mutual assistance in their work; having been told by the defendant two hours previously, when leaving home, that he was going hunting,—the promise to pay \$500 for services easily procurable for \$30; the assumed name, and the larceny which the defendant so openly avowed,—these and other circumstances aroused the suspicions of Smith. He went immediately to the MacRae cabin, arriving there about 4 o'clock, or a trifle earlier, where he found the contents scattered so "that it looked to me as though a man had left things in there as though he would be back most any time,—the same day or the next day." At the adobe chimney adjoining the cabin he found a trail made by the dragging of some heavy body; in the trail were pieces of lint and stuff which had caught on the twigs, grass and ground, and in places the lint showed that it had been rolled under whatever had made the trail. He followed the trail for

about a mile. There it stopped, and at that place, about 10 inches or a foot apart, were two pools of curdled blood, somewhat dry and hard. A few moments afterwards he saw the defendant proceeding on his way with the sheep and horses. The next day, the 26th, he and his half-brother Lewis made a further investigation. In the center of the trail they found a small, gray-handled pocketknife, and picked up some of the lint. Two days afterwards, on September 28th, they made another examination, and found that a second trail ran into the first one discovered, the second trail being about 200 yards long, and ending with the first one at the chimney. Pony tracks were visible on each trail. Where the trails stopped at the chimney there had been a large spot of blood, most of which had been shoveled into a hole, leaving on each side of the shovel's track a little strip of blood. Behind the chimney was blood, and there they found a stick of wood with blood on one side of it, from which the blood had dripped to the ground beneath, where, in a hole, and covered over, were found other bloody sticks and dirt. Smith was one of the posse that captured the defendant, who was found with the sheep, horses, wagon and watch. On his return trip home, and on the 10th or 11th of October, Smith and others discovered on the bank of the Musselshell river, at a point where the defendant passed with his sheep, evidences showing that a large fire had been built very near the brink. From a circular space 12 feet in diameter the ashes had been shoveled off, the marks of the shovel being distinct; towards and in the center the ground had been scraped clean, but near the edges there were some ashes and cinders, and the ground was blackened. In the river at this point, just opposite the remains of the fire was a natural washout or hole. There they spent a day and a half, finding in the edge of the water a piece of cinder or charred wood. Making a raft of logs, and a ladle with a handle 8 or 10 feet in length, they proceeded to explore the hole. They brought up, with cinders and ashes, four kinds of buttons, buckles, nails, pens, and pieces of bone and teeth, and fragments of skull, all showing the effect of

fire; there were enough of these things to fill a 10-pound lard pail. Leaving the river, they went to the MacRae cabin, and saw where a bullet had grazed a tree distant about 150 yards from the cabin, and near the second and shorter trail; the bullet was discovered in another tree, four or five feet distant from the tree that had been grazed.

Witness Sherman was one of the men who apprehended the defendant and his companions on Porcupine creek, about 30 miles from Forsyth. Sherman informed the defendant that he wanted him for the murder of MacRae and Allen; the defendant answered that both were alive and at Miles City. Upon his person were found some money, a pocketknife and a watch, the latter, at least, having admittedly belonged to MacRae. At Forsyth, Sherman received from James Calder the letter addressed to the sheriff, and hereinbefore copied. The testimony of Sherman in respect of the finding of the bones, teeth, buttons, nails, buckles, pens, and the like, is substantially that of Smith. Sherman then went to the MacRae cabin, saw the shorter trail, and followed the longer one to the place where Smith had found the two pools of blood on September 25th. Witness took up a clot of the blood the size of a man's hand, and placed it in a cloth, producing it in that condition before the jury. His testimony agreed with that of Smith as to the bloody stick in the hole found near the chimney, and in addition he gave reasons for his opinion that the physical facts indicated that "the bodies must have been laid across the sticks."

The witness Lewis testified: That he saw the defendant at about 3 or 4 o'clock on the afternoon of September 24th; that the defendant said he had been hunting and "stopped in for a few moments, and that his companions were outside, waiting for him;" he further said to Lewis that he and MacRae were leaving the country with Hildebrand's sheep, "and asked me to write to him at Miles City, to let them know if Hildebrand made any disturbance about the sheep, the letter to be addressed to 'Charles A. Brown, Miles City,' and he would get it." Between 8 and 9 o'clock in the forenoon of

the next day the defendant again went to see Lewis, and on that occasion informed Lewis that MacRae had hired him for a few days, and had sent him to get the team and wagon belonging to MacRae, for use at MacRae's place for a short time. On the morning of the 26th of September Lewis saw the two trails, and corroborated Smith's and Sherman's testimony respecting their appearance. Lewis testified further: That in the longer trail he found pieces of quilt, wool, and a jackknife; behind the chimney "we found where there had been some poles piled up, and blood,—looked like somebody had been piled up in there,—blood there on some sticks." The shorter trail was about 200 to 250 yards long, and led from a patch of timber to the chimney, and showed evidences that something heavy had been dragged over it.

Other witnesses testified as did Smith, Sherman and Lewis with respect to the trails, and the fragments taken from the river at the place where the great fire had been. Two iron handles, suitable to a chest, were also found in the hole. A physician and surgeon, called as an expert, declared that the bones had been subjected to the action of either a considerable degree of heat or long-continued heat; that the bones and teeth were those of an adult human being, and, in his opinion, of two persons.

The defendant was a witness in his own behalf. He denied the killing, but said he had no doubt, from all appearances, that both MacRae and Allen were dead. His story, in brief, is this: MacRae and Hildebrand owned a flock of sheep in common; MacRae asked defendant to steal Hildebrand's sheep and go away with the entire flock, which defendant on the 24th day of September consented to do, MacRae agreeing to pay him \$500 in hay, the wagon, team, harness, and the like; Lewis had made arrangements to buy the hay from the defendant; on the afternoon of the 24th the sheep were counted and divided into two bands, each containing the same number, but no plausible reason was shown why such division should have been made; that afternoon MacRae, Allen and the defendant, with his associates, prepared the contents of the

cabin for transportation by wagon; next morning they saw Allen and MacRae at the cabin,—the latter told him to go for the wagon at Lewis', which he did; and then the wagon was loaded; defendant, his brother and Fisher started away with the sheep at about 12:30 o'clock in the afternoon; MacRae and Allen had their packs ready, and intended to leave the country as soon as they got three horses which were near by; MacRae's plan was to purchase 300 sheep on the way to Miles City, so that the band, when sold, would bring \$6,000, which amount he desired to have when fleeing the state; in the next breath, however, the defendant testified that, instead of purchasing, MacRae intended, on the way to Miles City, to steal all the sheep that he conveniently could. The defendant never saw or heard of or from MacRae or Allen after he left them at the cabin in the afternoon of the 24th. From the cabin the defendant went to Smith's house for a bed, and told his mother that he was going hunting, but would return in a few days. When he met Smith, and asked him to write to Charles A. Brown, at Miles City, he did not tell Smith that MacRae was in the wagon. He admits writing the letter from Forsyth to the sheriff, and signing MacRae's name to it, and that he made no effort to ascertain whether MacRae or Allen was in Miles City, although he believed they were in that town. The defendant's testimony abounds in discrepancies and absurdities, and is shown to be untrue in material matters by circumstances and the statements of disinterested witnesses.

This evidence was sufficient to satisfy the requirement of section 358, *supra*, that the death of the person alleged to have been killed must be established by direct proof as a fact independent of the fact of the killing by the defendant; it was, indeed, ample. The death of a human being was directly proved by the identification of certain teeth and charred bones as those of an adult person; that the decedent was MacRae was established by the direct testimony of the accomplice, corroborated by circumstantial evidence which in itself tended to prove such identity. The provisions of section 2089, *supra*, were also met by the proofs: The accomplice was corrob-

rated by other evidence which in itself, and without the aid of the testimony of the accomplice, tended to connect the defendant with the murder of MacRae. It is not necessary that the evidence in corroboration of the accomplice must be of sufficient strength, when standing alone, to connect the defendant with the commission of the crime, or to establish his guilt; if it tends in and of itself alone to prove the defendant's connection, it is sufficient. *State v. Geddes*, 22 Mont. 68, 55 Pac. 919; *People v. Elliott*, 106 N. Y. 288, 12 N. E. 602; *Murray v. Com.* (Ky.) 28 S. W. 480; *State v. Townsend*, 19 Or. 213, 23 Pac. 968; *State v. Russell*, 90 Iowa, 493, 58 N. W. 890; *Fort v. State*, 52 Ark. 180, 11 S. W. 959; *People v. Christian*, 78 Hun. 28, 29 N. Y. Supp. 271; *People v. Grundell*, 75 Cal. 301, 17 Pac. 214.) The statement by the defendant to Smith that MacRae was in the wagon, but did not wish to be seen, and his possession of the dead man's watch, sheep, horses and wagon, were, under the circumstances, and without reference to the testimony of the accomplice, evidence tending to connect the defendant with a murder as appalling and fiendish in its commission and incidents as was ever perpetrated in Montana. Nor was it necessary that the whole case for the state should have been established by the corroboratory evidence. (*People v. Hooghkerk*, 96 N. Y. 149.)

3. The court charged that the defendant was either guilty of murder of the first degree, or not guilty of any grade of homicide, saying to the jury that a definition of murder of the second degree would be of no use, because the defense was that the defendant had nothing to do with the killing of MacRae. Of this the defendant complains, upon the ground that the degree should have been left for the jury to find. We remark, in passing, that the reason assigned by the court for omitting to define murder of the second degree is unsound: nevertheless, if the instruction itself be correct, it will not be vitiated by the statement of a wrong reason in its support.

The element which raises murder of the second degree to murder of the first degree is deliberation. Where the proof of guilt on a trial for deliberate murder is to be deduced from

circumstantial evidence alone, the court should ordinarily, and perhaps always, charge the jury as to murder of the first and second degrees, and should also charge as to manslaughter whenever there is any evidence tending to negative the presence of malice; for in such cases the circumstances may permit of inferences tending to show the commission of different grades of felonious homicide. If the killing was unlawful only, manslaughter is the crime; add to the element of unlawfulness malice aforethought only, and murder of the second degree is the crime; and, lastly, add deliberation to unlawfulness and malice aforethought, and murder of the first degree is the crime. Even in cases depending for proof of guilt largely or chiefly upon direct evidence, the omission to instruct with respect to murder of the second degree is a dangerous practice, and would in most cases constitute error sufficient to reverse a judgment convicting the defendant of the higher crime; the reason being that the question of fact of whether or not the element of deliberation was present is, save in very exceptional cases, to be determined, not by the court, but by the jury. The case at bar, however is exceptional. The murder alleged, if committed, was, under the evidence, deliberate, or MacRae was not unlawfully slain. Unless the jury believed the story of the killing as related by James Calder, they could, under their oaths, do nothing but find the defendant not guilty. If they believed it, the verdict could be nothing less than guilty of murder of the first degree. It is not the duty of the court to charge upon murder of the second degree, or upon a lower grade of homicide, where there is no evidence, direct or circumstantial, to which the instruction could apply. (*State v. Hopper*, 71 Mo. 425; *State v. Umble*, 115 Mo. 452, 22 S. W. 378, approved in *State v. Fairlamb*, 121 Mo. 137, 25 S. W. 895; *State v. Estep*, 44 Kan. 572, 24 Pac. 986; *Fertig v. State*, 100 Wis. 301, 75 N. W. 960; *Jones v. State*, 52 Ark. 345, 12 S. W. 704; *Smith v. U. S.*, 1 Wash. Ter. 262; *Washington v. State*, 36 Ga. 222; *Bish. New Cr. Proc.* Vol. I, Sec. 980, subd. 2, and cases there cited; *Thomason v. Territory*, 4 N. M. (Johns.) 150, 13 Pac.

223; *People v. Chavez*, 103 Cal. 407, 37 Pac. 389; 10 Enc. Pl. & Prac. 164; *Cornell v. State* (Wis.), 80 N. W. 745; *Territory v. McAndrews*, 3 Mont. 158.) The defendant in this case is guilty of murder of the first degree, or he is innocent. There is no possible intermediate ground.

4. The defendant prayed, and the court refused to give, a charge in respect of the burden resting upon the state to establish beyond a reasonable doubt the existence of each link in the chain of circumstantial evidence. The court did not err. The question of guilt or innocence was not dependent upon circumstantial evidence alone, or in a controlling degree upon such evidence, and therefore the case did not require a special instruction as to that means of proof. There was direct evidence of the main fact, and the indirect evidence was merely in corroboration. (*Woolaridge v. State*, 13 Tex. App. 443; *Buntain v. State*, 15 Tex. App. 515; *Leeper v. State*, 29 Tex. App. 154, 15 S. W. 411.) Were the refusal to charge specifically upon circumstantial evidence held to be error in all cases where it, in conjunction with direct evidence, is relied upon as tending to prove guilt, the cases free from error in that regard would be extremely few; for in almost every, if not in every, prosecution there is indirect evidence of a material nature. In the case at bar the court fully and accurately charged the jury upon the law applicable to the facts, including the instruction usually given upon the subject of reasonable doubt, and the defendant has no just cause to complain.

Finding the record free from error, the order refusing a new trial is affirmed.

Affirmed.

STATE, APPELLANT, v. SCHNEPEL, RESPONDENT.

[No. 1,473.]

[Submitted January 10, 1900. Decided February 5, 1900.]

Criminal Law—Witnesses—Indorsing Names on Information—Evidence—Impeaching Defendant—Instructions—Weight of Evidence—Preponderance of Evidence—Reasonable Doubt—New Trial—Defect in Information—Waiver.

1. Under Penal Code, Section 1734, requiring the county attorney to indorse on the information, on filing it, the names of the witnesses for the state, if known, but not providing for the indorsement of other witnesses thereafter discovered, the act of the attorney at the trial in indorsing, under the directions of the court, the names of other witnesses on the information is not error, as such witnesses were subject to be examined whether their names were indorsed on the information or not.
2. It is error to deny the county attorney the right to examine witnesses because their names do not appear on the information, in the absence of a showing on the part of the defendant that the county attorney did in fact know of their existence at the time the information was filed.
3. When a defendant is sworn, and testifies in his own behalf, he is subject to the same rules of cross-examination and impeachment as any other witness, and it is competent for the state to impeach his testimony by evidence that his general reputation for truth, honesty and integrity is bad.
4. An instruction calling special attention to the defendant's witnesses and giving special direction as to how their evidence should be weighed, is properly refused, as invading the province of the jury.
5. The refusal of an instruction casting upon the state no greater burden than that of showing by a preponderance of the evidence the circumstances establishing defendant's guilt was proper, since the universal rule is that in all such cases the prosecution must establish such circumstances beyond a reasonable doubt.
6. Under Penal Code, Section 1910, providing that an information may be set aside when not properly subscribed by the county attorney, and Section 1911, providing that, unless a motion to set aside be made before demurrer or plea, this ground of objection is waived, if the motion to set aside the information was made in the trial court, and improperly refused, the error can be reviewed only on appeal from the judgment; it cannot be reviewed on an appeal from an order granting a new trial, not being one of the grounds for new trial enumerated under Penal Code, Section 2192.
7. It is error, in a criminal case, to grant defendant's motion for a new trial on the ground that the information therein is not properly subscribed.
8. The rule that the trial court's action in granting a new trial cannot be disturbed, even if it committed errors during the course of the trial, because such action was discretionary, applies only when the motion is made upon grounds which appeal to the discretionary power of the court, hence does not apply where the motion was made upon assignments of errors in law only.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

28	523
26	72
23	523
27	288
28	523
29	223
29	306
23	523
32	323
23	523
34	146
34	437
34	461
34	509
23	523
39	178
39	343
23	523
41	439

HENRY SCHNEPEL was convicted of grand larceny. From an order granting a new trial the state appeals. Reversed.

Mr. C. B. Nolan, Attorney General, and Mr. C. P. Connolly, for the State.

Mr. M. J. Cavanaugh, and Mr. David M. Durfee, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the Court.

On October 14, 1897, the defendant was convicted of the crime of grand larceny, and thereafter, on the 21st day of October, was sentenced to imprisonment in the state prison for the term of one year. Thereupon he made a motion for a new trial, alleging as grounds therefor various prejudicial errors. On March 4, 1899, the motion was granted. From the order granting a new trial the state has appealed. The order does not indicate the ground upon which the action of the trial court was based in granting the motion. It will therefore be necessary to notice all the assignments of error made by defendant, in order to determine whether the action of the trial court was justified; for, if that court was justified in granting a new trial upon any one of the errors assigned, the order must be affirmed.

1. The charge was preferred by information. After the jury was selected, but before any proof was offered, the county attorney asked leave of the court to indorse upon the information the names of three witnesses, not known to him at the time the information was filed. Such leave was granted over objection of counsel for defendant, and the indorsement was made. Defendant saved his exception. The only provision of the statute upon this subject is Section 1734 of the Penal Code. By it the duty is enjoined upon the county attorney to indorse upon the information, upon filing it, the names of the witnesses for the state, if known. The purpose of this requirement is to enable the defendant to make inquiry as to

the witnesses, and to prepare to meet their testimony. (*State v. Calder, ante*, p. 504, 59 Pac. 903.) The duty of the county attorney is fully performed under this provision, however, when he has, at the time of presenting the charge for filing, indorsed the names of all witnesses then known to him; for there is no command that, if thereafter other witnesses are discovered, their names shall also be indorsed. Such witnesses may be called and examined at the trial whether their names have been indorsed or not. (*State v. Sloan*, 22 Mont. 293, 56 Pac. 364.) The defendant, therefore cannot complain if the county attorney indorses their names under the directions of the court, thus giving formal notice of the intention to call them, when no such notice is required. It is the duty of this officer to discover and present all the evidence he can obtain. He would be remiss in the performance of this duty should he neglect to do so. The mere fact that the names of the additional witnesses were written upon the information did not add to or detract from the probative force of their testimony; and it would have been error to deny the county attorney the right to examine them because their names did not appear thereon, in the absence of a showing on the part of the defendant that the county attorney did in fact know of their existence at the time the information was filed. Had such showing been made, it would still have been within the discretion of the court to permit the names of the witnesses to be indorsed, and their testimony to be used. (*State v. Calder, supra.*) No such showing was made in this case. No objection was interposed to the examination of the witnesses, nor any complaint made that defendant had not had sufficient opportunity to meet and controvert their evidence. The objection was based upon a misconception of the law, and was without merit.

2. The defendant testified in his own behalf, going fully into the facts constituting his defense. To impeach his testimony, the state called several witnesses, who testified that his general reputation for truth, honesty and integrity in the neighborhood where he lived was bad. Objection was made

that such evidence was incompetent, inasmuch as the defendant had not himself put his character in issue. The objection was overruled. The defendant having testified to matters material to his defense, it was competent for the state to impeach his testimony. When a defendant is sworn, and testifies in his own behalf, he is subject to the same rules of cross-examination and impeachment as any other witness. (Code of Civil Procedure, Sec. 3379; Penal Code, Sec. 2078.) See, also, *Mitchell v. State*, 94 Ala. 68, 10 South. 518; *People v. Beck*, 58 Cal. 212; *Drew v. State*, 124 Ind. 9, 23 N. E. 1098; *State v. Rainsbarger*, 79 Iowa, 745, 45 N. W. 302; *State v. Day*, 100 Mo. 242, 12 S. W. 365; *State v. Broderick*, 61 Vt. 421, 17 Atl. 716. The objection was properly overruled.

3. Complaint was made that the court erred in refusing to submit the following instruction to the jury: "The jury are instructed that in passing upon the testimony of defendant's witnesses in this case they should endeavor to reconcile their testimony with the belief that all the witnesses have endeavored to tell the truth, if they can reasonably do so under the evidence, and, if reasonably possible, attribute any differences or contradictions in their testimony, if any exist, to mistake or misrecollection, rather than to a willful intention to swear falsely." The instruction was properly refused. It would have invaded the province of the jury by calling special attention to the defendant's witnesses and in giving special direction as to how their evidence should be weighed. By implication the jury would have been given to understand that the same rule should not be applied to the other witnesses in the case. The court may not properly call the attention of the jury specially to any particular witness, or class of witnesses, or to any particular portion of the evidence. Such an instruction is calculated to induce the jury to infer that the portion of the evidence thus noticed is of special importance or weight, and lead them to give less consideration to other portions which they ought to examine with equal care. This Court, in *Wastl v. Montana Union Railroad Co.*, 17 Mont. 213, 42 Pac. 772, considered an instruction calling the attention of

the jury to certain witnesses by name. It was there said: "The credibility of the witnesses is a question to be determined solely by the jury. The court has no right to comment upon their credibility, either by word or intimation. By designating the three witnesses named in the instruction among the great number who testified in the case, and calling the particular attention of the jury to their testimony, and theirs only, the court intimated that there was something connected with their evidence which demanded particular scrutiny, and to that extent the instruction was an implied comment on their evidence and credibility; at least, the jury was authorized to so consider it." The vice of the instruction under consideration here is the same, for there is no difference between calling certain witnesses by name and pointing them out by some other designation equally as effective to distinguish them. (*People v. Hawes*, 98 Cal. 648, 33 Pac. 791; *Allen v. State*, 111 Ala. 80, 20 South. 490; *Model Mill Co. v. McEver*, 95 Ga. 701, 22 S. E. 705; *Scott v. People*, 141 Ill. 195, 30 N. E. 329; *Goodwin v. State*, 96 Ind. 550.)

While a trial court may instruct the jury that they should, in considering the evidence, presume that a witness speaks the truth, unless there is some reason to think otherwise (*Thompson on Trials*, Sec. 2420; *State v. Jones*, 77 N. C. 520), the instruction given must apply to all witnesses in the case, and not to some to the exclusion of others.

Complaint was also made that the court refused the following instruction: "The jury are instructed as a matter of law that, where a conviction of a criminal offense is sought upon circumstantial evidence, the prosecution must not only show by a preponderance of the evidence that the alleged facts and circumstances are true, but they must be such facts and circumstances are absolutely incompatible upon any reasonable hypothesis with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than that of the guilt of the accused. And in this case all the facts and circumstances relied upon by the prosecution to secure a conviction, if they can be reasonably accounted for upon any

theory consistent with the innocence of the defendant, the verdict should be not guilty." It will be observed that this instruction does not read intelligently, because of the use of the word "be" for the word "believe." Still, if this correction had been made, the instruction was nevertheless properly refused. It casts upon the state no greater burden than that of showing by a preponderance of the evidence the circumstances establishing the guilt of the defendant, whereas it is the universal rule that in all cases where the guilt of the defendant is sought to be established by circumstantial evidence the burden devolves upon the prosecution of establishing to the satisfaction of the jury beyond a reasonable doubt all the circumstances necessary to show such guilt. (*State v. Gleim*, 17 Mont. 17, 41 Pac. 998, 31 L. R. A. 294.) Furthermore, an examination of the instructions given by the court shows that the jury were fully and correctly instructed upon the phase of the law involved in the instruction under consideration.

4. The last error assigned, and the one to which counsel for the respondent devotes almost his entire argument in the effort to support the action of the trial court in setting aside the verdict of the jury, is based upon the assertion that the information filed herein is not properly subscribed. An examination of the record shows that it is subscribed by the chief deputy county attorney, instead of by the county attorney. Section 2192 of the Penal Code enumerates the grounds upon which the court may grant a new trial. The failure of the county attorney or the attorney prosecuting to properly subscribe the information is not enumerated in this section as one of the grounds for a new trial. True, section 1910 of the same code provides that the information may be set aside where it is not properly subscribed by the county attorney or the attorney prosecuting; but section 1911 provides further that, unless a motion be made to set aside the information before demurrer or plea, this ground of objection to it is deemed to be waived. (*State v. McCaffery*, 16 Mont. 33, 40 Pac. 63.) The record does not show whether a motion to set

aside the information was made in the trial court. Even if there had been, and the court had erred in refusing to set it aside for the reason that it was not properly subscribed, the error thus committed by the trial court could be reviewed only on appeal from the judgment. The question presented by this assignment is, therefore, not before this court on this appeal. If the court below granted defendant's motion for a new trial on this ground, it was error.

No assignment was made in the court below as to the insufficiency of the evidence to sustain the verdict of the jury. Counsel for respondent contend here that, even if the court committed no error during the course of the trial, yet its action in granting a new trial on the motion of the defendant cannot be disturbed, because such action was discretionary. This is the rule when the motion is made on the ground of insufficiency of the evidence, or other ground which appeals to the discretionary power of the court; but when the motion is made upon assignments of errors in law only, as in this case, it is not addressed to the discretion of the court, but presents a question of strict legal right. (Hayne, New Trial & App. Sec. 100; *Hinkle v. S. F. & N. P. Railroad Co.*, 55 Cal. 627.)

The trial court having committed no error during the progress of the trial, it was clearly error to grant a new trial for any of the reasons assigned in this record. The order granting a new trial is therefore reversed, and the cause remanded to the district court, with direction to enforce the judgment as originally entered. *Remittitur* forthwith.

Reversed and remanded.

AMERICAN HAND-SEWED SHOE CO., APPELLANT, v.
O'ROURKE, RESPONDENT.

[No. 1,266.]

[Submitted January 25, 1900. Decided February 5, 1900.]

*Foreign Corporations—Noncompliance With Domestic Statutes
—Allegations of Complaint.*

Since it is unnecessary for a foreign corporation plaintiff, bringing action on a domestic contract, to allege in its complaint that it complied with the statutes of the state entitling it to do business therein, the question of its noncompliance therewith can only be raised by answer.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

ACTION by American Hand-Sewed Shoe Company, a corporation, against John O'Rourke and others, co-partners as A. Ducharme & Co. Judgment for defendant O'Rourke, and plaintiff appeals. Reversed.

STATEMENT OF THE CASE.

Plaintiff alleges that it is, and was at all times mentioned in the complaint, a corporation organized and existing under and by virtue of the laws of the state of Rhode Island; that for some time prior to the 1st day of May, 1894, it had a course of dealings upon credit with the said defendants, doing business as co-partners; that on or about said 1st day of May defendant John O'Rourke withdrew from said partnership; that at various times between the said 1st day of May, 1894, and the 21st day of December, 1895, plaintiff sold certain goods to the said partnership upon credit; that a balance of \$1,171.67 remains unpaid upon said account, though demand of payment has been made; that plaintiff had no notice or knowledge at any time prior to said 21st day of December of the withdrawal of the said John O'Rourke from said part-

nership; that during all of the said time from the said 1st day of May, 1894, to the said 21st day of December, 1895, said partnership business was continued at the same place and under the same firm name as before, and that during all of this time defendant John O'Rourke held himself out as a partner in said firm; that plaintiff was induced to sell such goods upon credit in the belief that the defendant John O'Rourke continued as a member of the said firm; and "that all of said goods, wares and merchandise were ordered by the said A. Ducharme & Co., in said Butte City, Montana, and were shipped and consigned by plaintiff to the said A. Ducharme & Co. at the said Butte City, Montana."

The answer of defendant John O'Rourke admits all of these allegations except that he held himself out as a partner subsequent to the 1st day of May, 1894, and that plaintiff did not have knowledge and notice of his withdrawal.

Defendants Thomas O'Rourke and A. Ducharme suffered default. The cause was tried as between plaintiff and defendant John O'Rourke. A witness being called on behalf of plaintiff, defendant objected to the introduction of any testimony, and moved for judgment on the pleadings. The objection and motion were by the court sustained, and judgment was entered in favor of said defendant and against the plaintiff for costs. From said judgment, plaintiff appeals.

Mr. John H. Shelton, for Appellant.

Mr. Emmet Callahan and *Mr. J. O. Bender*, for Respondents.

PER CURIAM.—The ground of defendant's motion for judgment on the pleadings was that it appeared from the face of the complaint that plaintiff was a foreign corporation engaged in business in Silver Bow county, Montana, and had brought this suit to enforce a contract that was void because of plaintiff's failure to comply with the provisions of the Civil Code of Montana, Division I, Part IV, Title XI, concerning foreign corporations, in that plaintiff had not filed in the office

of the secretary of state, or with the county clerk of Silver Bow county, a copy of its charter, or a certificate of consent to be sued in the courts of Montana, and had not designated a person in this state upon whom service of process could be made, etc.

The appellant's contention brings this case directly within the rule laid down in *Zion Co-operative Mercantile Association v. Mayo*, 22 Mont. 100, 55 Pac. 915, decided since the appeal herein was filed. The conclusion reached in the *Zion Association Case* was, generally, that in an action by a foreign corporation to enforce a domestic contract it is unnecessary for the plaintiff corporation to plead in its complaint compliance with the statutes of the state entitling it to do business within the state. Defendant may, by answer, set up plaintiff's noncompliance with the statutes as a ground upon which the contract is void as to the corporation, and for the purpose of preventing the enforcement of the same in favor of the plaintiff corporation, and thus raise an issue; but without such a pleading on defendant's part, the question of such noncompliance cannot be raised.

The judgment is reversed, and the cause remanded.

Reversed and remanded.

STATE, RESPONDENT, v. McCLELLAN, ET AL.,

APPELLANTS.

[No. 1,479.]

[Submitted January 9, 1900. Decided February 5, 1900.]

*Criminal Law — Defense — Alibi — Burden of Proof —
Appeal — Instructions — Refusal — Witnesses — Cross-
Examination — Redirect Examination.*

1. The burden of proof is not shifted by the defense of an alibi, and defendant cannot be convicted if the evidence raises a reasonable doubt of his presence at the time and place where the crime was committed.
2. Defendant cannot predicate error on the giving of an instruction which he requested.
3. An erroneous instruction charging that the defense of an alibi, to be entitled to con-

sideration, must be proved by the defendant, is not cured by a subsequent charge telling the jury to acquit if they had a reasonable doubt of defendant's presence at the time and place of the commission of the alleged crime, as said charges are irreconcilable and misleading.

4. Where the prosecuting witness testified on cross-examination that he had been in jail, he may, on redirect examination, explain the circumstances of his imprisonment.
5. Where a witness for the state testified that the prosecuting witness had paid out money for drinks in a saloon before the alleged robbery was committed, it was competent on cross-examination to show that the prosecuting witness had spent all his money before the robbery.
6. There is no error in refusing an instruction in a criminal case which singles out one witness, and directs the jury to consider his condition in particular at the time of the transactions concerning which he testified.
7. It is not error for the court to refuse a request to charge as to the duty of the jury in their consideration of the testimony of the defendant, where such subject is sufficiently covered by the instructions of the court.

Appeal from District Court, Ravalli County; Frank H. Woody, Judge.

ARTHUR McCLELLAN and MICHAEL HERRIGAN were convicted of robbery, and they appeal. Reversed.

Mr. R. Lee McCulloch and Messrs. Crutchfield & Draffen, for Appellants.

Mr. C. B. Nolan, Attorney General, for the State

It is never permissible for the defendant, in cross-examining the plaintiff's witness, to inquire of matters which constitute an affirmative defense. Such a course is open to the two-fold objection that it is not proper cross-examination, and that it reverses the order of proof. *Hull v. State*, 93 Ind. 128; *Schmidt v. Schmidt*, 47 Minn. 451; *Sterling v. Bock*, 37 Minn. 29; *Wendt v. Chicago, etc. R. Co.*, 4 S. Dak. 476; *Da Lee v. Blackburn*, 11 Kan. 190; *Elkmake v. Buckley*, 16 S. & R. (Pa.) 72; *McKinley v. McGregor*, 3 Whart. (Pa.) 370; *Floyd v. Bovard*, 6 W. & S. (Pa.) 75.) Besides the rule is well established that while the opportunity of cross-examining the opposing party's witness is a matter of right, that the latitude allowable in cross-examination is very largely within the discretion of the trial court, and an appellate court will not interfere unless the discretion is oppressively abused. (*Woolfolk v. State*, 85 Ga. 69; *Brooklyn v. State*, 26 Tex. Ct.

App. 121; *Commonwealth v. Lyden*, 118 Mass. 452; *State v. Moy*, 33 So. Car. 39; *The Pennsylvania Co. v. Newmeyer*, 129 Ind. 401; *Birmingham Fire Ins. Co. v. Pulver*, 126 Ills. 329; *Dunn v. Altman*, 50 Mo. App. 231; *Bohan v. Avoca Borough*, 154 Pa. State, 404.) Even though on a question of *alibi* the charge of the court contains an objectionable statement of the law, this is no ground for reversal, if the remainder of the charge, or the charge taken as a whole, contains a full and fair exposition of the law. (*People v. Levine*, 85 Cal. 39; *People v. Farm Pai*, 86 Cal. 225; *People v. Chung Heong*, 86 Cal. 329; *Sheehan v. People*, 131 Ills. 22; *People v. Pearsall*, 50 Mich. 233; *People v. Stone*, 117 N. Y. 480; *State v. Jaynes*, 78 N. Car. 504; *Com. v. Choate*, 105 Mass. 451; *State v. Freeman*, 100 N. Car. 429.)

MR. JUSTICE HUNT delivered the opinion of the Court.

Defendants appeal from a judgment of conviction of robbery and from an order overruling their motion for a new trial.

1. On the trial, defendants introduced evidence tending to support an *alibi*. The court gave the following instruction at the request of the state (No. 13): "The court instructs the jury that the defense of *alibi*, to be entitled to consideration, must be such as to show that at the very time of the commission of the crime charged the accused was at another place, so far away, or under such circumstances, that he could not, with any ordinary exertion, have reached the place where the crime was committed, so as to have participated in the commission thereof. The burden is upon the defendant to prove this defense;" and then instructed as follows, at the defendants' request (No. 14): "The court instructs the jury that one of the defenses interposed by defendants in this case is what is known in law as an *alibi*; that is, that the defendants were at another place at the time of the alleged commission of the crime. If proved,—and all of the evidence bearing upon that point should be carefully considered by the jury,—or if, in view of all the other evidence, the jury have any reasonable

doubt as to whether these defendants were in some other place when the crime is alleged to have been committed, they should give the defendants the benefit of the doubt, and find them not guilty." "The court instructs the jury that, as regards the defense of an *alibi*, the defendants are not required to prove it beyond a reasonable doubt to entitle them to an acquittal. It is sufficient if the evidence upon that point raises a reasonable doubt of their presence at the time and place of the commission of the alleged crime."

Defendants insist that the first of these instructions quoted was erroneous in itself, and not cured by the two, or either of them, thereafter given. This contention is sound. Evidence of an *alibi* is competent under defendant's plea of not guilty. No special averment need be made to warrant the introduction of testimony in support of it. The state must prove the presence of the defendant as part of the essence of the crime as charged, except, of course, where such presence is unnecessary, but that phase of the law we need only mention. There is no *prima facie* case without showing the presence of the defendant; therefore defendant may rebut the evidence of the fact of his presence by evidence of the fact that he was not present. *Alibi* is not a special defense changing the presumption of innocence, or relieving the state of its burden of proving the guilt of the defendant beyond a reasonable doubt. (Bishop's Cr. Proc. Vol. I, Sec. 1066.) The defendant is not bound to establish it by a preponderance of the evidence. (*State v. Spotted Hawk*, 22 Mont. 33, 55 Pac. 1026.) It is true that, when the state has made out a *prima facie* case of guilt, the burden is then upon the defendant to rebut such a showing; but, if he relies upon an *alibi*, he is not obliged to prove it as an effect by a preponderance of evidence, for he need only rebut the evidence of his presence by such an amount of evidence as will, upon a consideration of the whole case, raise a reasonable doubt of his guilt of the crime for which he is on trial. (*Schultz v. Territory* (Ariz.) 52 Pac. 352.) It is a necessary sequence of the statement that, when the defendant must be proven guilty by the state

beyond a reasonable doubt, if there is a reasonable doubt whether he was present or absent when and where the crime was committed, a reasonable doubt of his guilt has arisen, and acquittal must follow.

The somewhat confused question of how the defense of an *alibi* relates to the whole case in criminal law simplifies itself when we discard the illogical doctrine that it is an affirmative defense, to be proved by the defendant, and substitute therefor the doctrine, which easily flows from the premises already stated, that it is but one of the many defenses offered in rebuttal of the state's evidence, carrying with it to the defendant no burden of proof other than the obligation to introduce evidence sufficient to raise a reasonable doubt. This he may do by evidence sufficient to raise a reasonable doubt of his presence at the place where the act was done, and this doubt may arise without its springing from an affirmatively proved fact that he was somewhere else at the time, and could not have committed it. (Section 3101, Code of Civil Procedure; *Com. v. Choate*, 105 Mass. 451; *Johnson v. State*, 21 Tex. App. 368, 17 S. W. 252; *State v. Taylor*, 118 Mo. 153, 24 S. W. 449; *Peyton v. State*, 54 Neb. 188, 74 N. W. 597.)

Subjected to the test of these principles, instruction No. 13 was erroneous. Its effect was to prevent the jury from giving consideration to the defendants' evidence tending to establish an *alibi* unless they had carried their burden, and proved the defense, whereas the court ought to have charged that it was the duty of the jury to consider all the evidence before them, including that bearing upon the *alibi*, and conclude from the whole thereof whether the guilt of the defendants was proven beyond a reasonable doubt. It follows that the burden of proof was not altered by the defense of an *alibi*. If the defendants' evidence upon that point raised a reasonable doubt of their guilt, it became the duty of the jury to acquit, even though they were not satisfied that the *alibi* was clearly established as a fact. (*State v. Taylor, supra*; *Walters v. State*, 39 Ohio St. 215; *People v. Roberts*, 122 Cal. 377, 55 Pac. 137.)

What we have just said pertains in many respects to instruction No. 14, given at defendants' request; although, were it not for the greater and farther extending error throughout instruction 13, given at the instance of the prosecution, we should not reverse the case for the erroneous principle announced in No. 14, inasmuch as defendants cannot predicate error upon the giving of an instruction requested by themselves. (*Territory v. Burgess*, 8 Mont. 57, 19 Pac. 558.)

Instruction No. 15 was not consistent with No. 13. The one (No. 13) required the defendants to prove an *alibi* and authorized an acquittal on that ground only if the defendants *proved* the *alibi*. Evidence only *tending* to prove it, did not permit the consideration of the *alibi* as a defense. It was useless to defendants unless they had established the fact. Thus, a reasonable doubt of the presence of the defendants at the commission of the offense charged could not avail them, for they were obliged to prove their absence as a fact in negation of the state's necessary proof of the fact of presence. No. 15, on the other hand, told the jury to acquit if they had a reasonable doubt of defendants' presence at the time and place of the commission of the alleged crime. To clearly reconcile these confusing statements is impossible. The supreme court of Iowa, in *State v. Maher*, 74 Iowa, 77, 37 N. W. 2, has said that substantially similar charges are not necessarily inconsistent or contradictory, resting their opinion upon the difference between a defense and the evidence tending to establish a defense. But the learned court assume, as a matter of course, that, if the *alibi* is not established by a preponderance of evidence, it is not to be considered as proved, and that, unless so proved, it can have no consideration in controlling their finding on the defense of an *alibi*. With this assumption we cannot agree. In our opinion, too, the argument that a jury would be able to draw the distinction recognized by the Iowa court, at least without special explanation of its possible existence, is strained. The emphasized error in No. 13 cannot well be harmonized with the proposition in No. 15 without overlooking the full applicabil-

theory consistent with the innocence of the defendant, the verdict should be not guilty." It will be observed that this instruction does not read intelligently, because of the use of the word "be" for the word "believe." Still, if this correction had been made, the instruction was nevertheless properly refused. It casts upon the state no greater burden than that of showing by a preponderance of the evidence the circumstances establishing the guilt of the defendant, whereas it is the universal rule that in all cases where the guilt of the defendant is sought to be established by circumstantial evidence the burden devolves upon the prosecution of establishing to the satisfaction of the jury beyond a reasonable doubt all the circumstances necessary to show such guilt. (*State v. Gleim*, 17 Mont. 17, 41 Pac. 998, 31 L. R. A. 294.) Furthermore, an examination of the instructions given by the court shows that the jury were fully and correctly instructed upon the phase of the law involved in the instruction under consideration.

4. The last error assigned, and the one to which counsel for the respondent devotes almost his entire argument in the effort to support the action of the trial court in setting aside the verdict of the jury, is based upon the assertion that the information filed herein is not properly subscribed. An examination of the record shows that it is subscribed by the chief deputy county attorney, instead of by the county attorney. Section 2192 of the Penal Code enumerates the grounds upon which the court may grant a new trial. The failure of the county attorney or the attorney prosecuting to properly subscribe the information is not enumerated in this section as one of the grounds for a new trial. True, section 1910 of the same code provides that the information may be set aside where it is not properly subscribed by the county attorney or the attorney prosecuting; but section 1911 provides further that, unless a motion be made to set aside the information before demurrer or plea, this ground of objection to it is deemed to be waived. (*State v. McCaffery*, 16 Mont. 33, 40 Pac. 63.) The record does not show whether a motion to set.

aside the information was made in the trial court. Even if there had been, and the court had erred in refusing to set it aside for the reason that it was not properly subscribed, the error thus committed by the trial court could be reviewed only on appeal from the judgment. The question presented by this assignment is, therefore, not before this court on this appeal. If the court below granted defendant's motion for a new trial on this ground, it was error.

No assignment was made in the court below as to the insufficiency of the evidence to sustain the verdict of the jury. Counsel for respondent contend here that, even if the court committed no error during the course of the trial, yet its action in granting a new trial on the motion of the defendant cannot be disturbed, because such action was discretionary. This is the rule when the motion is made on the ground of insufficiency of the evidence, or other ground which appeals to the discretionary power of the court; but when the motion is made upon assignments of errors in law only, as in this case, it is not addressed to the discretion of the court, but presents a question of strict legal right. (Hayne, New Trial & App. Sec. 100; *Hinkle v. S. F. & N. P. Railroad Co.*, 55 Cal. 627.)

The trial court having committed no error during the progress of the trial, it was clearly error to grant a new trial for any of the reasons assigned in this record. The order granting a new trial is therefore reversed, and the cause remanded to the district court, with direction to enforce the judgment as originally entered. *Remittitur* forthwith.

Reversed and remanded.

STATE, RESPONDENT, v. FISHER, APPELLANT.

[No. 1,421.]

[Submitted January 2, 1900. Decided February 7, 1900.]

Criminal Law—Homicide—Testimony of Accomplice—Corroboration—Instructions—Degrees of Offense—Burden of Proof—Oral Instructions—Evidence of Good Character—Oral Instructions After Submission—Advising Acquittal—Coercing Agreement of Jury—Compulsion as a Defense.

1. Where the defendant's own testimony in itself, and without the aid of the testimony of an alleged accomplice, tends to connect the defendant with the commission of the crime, such testimony is in law a sufficient corroboration of the alleged accomplice.
2. Where the jury might have found from the evidence that an alleged accomplice was not an accomplice, a conviction can be rightly had upon his uncorroborated testimony.
3. Where the proof of defendant's guilt is wholly circumstantial, and the evidence warrants a conviction of murder in either first or second degree, it is reversible error for the court to withhold from the consideration of the jury murder of the second degree, and instruct the jury that the defendant "is either guilty of murder in the first degree or he is not guilty at all."
4. Under Penal Code, Section 2081, upon a trial for murder, the commission of the homicide by the defendant being proved, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable, the crime is presumed to be murder of the second degree, and the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon the defendant,—if he would reduce the crime to manslaughter, there must be produced evidence sufficient to create a reasonable doubt of the existence of malice.
5. Since Penal Code, Section 2070, commands the court to charge the jury in writing, and forbids oral comments upon the instructions, unless by agreement of both the state and the accused, mere silence of the accused or his counsel is not equivalent to a consent to the giving of oral instructions.
6. The provisions of Penal Code, Section 2070, requiring written instructions, and forbidding oral comments on the instructions unless by agreement of both the state and the accused, are mandatory, and the violation thereof is reversible error.
7. Under Penal Code, Section 2070, a charge is oral if not in writing at the time of its delivery and read to the jury as written,—and the same is true of the information mentioned in Penal Code, Section 2123, and the giving of any such oral instructions or comments on the instructions is prejudicial error, even though they be taken down in short hand by the official stenographic reporter who is required by Code of Civil Procedure, Section 371, "to take full notes of all the proceedings at the trial."
8. Where defendant's affidavit for a continuance stated that certain witnesses, if present, would testify to his good character, and the state admitted the fact that they would so testify, it was a reversible error for the court to charge in writing that good character "if proved by competent evidence" always goes to the defendant's credit, and when the jury returned for further instructions as to their right to consider his past life, to instruct them orally to the effect that they could consider nothing outside of the testimony given on the witness stand, but that the defendant's failure to produce the depositions of his witnesses should not prejudice the jury against him, although the charge on the subject when the case was submitted was otherwise correct.

23	540
124	286
24	304
24	573
23	540
28	58

9. On a trial for murder, it is improper for the court to direct the attention of the jury to the expense incident to a new trial as the reason why they should reach a verdict.
10. If a trial judge is of the opinion that the defendant, if convicted, should be granted a new trial because of the insufficiency of the evidence, it is his duty to advise the jury to return a verdict of not guilty.
11. On a trial for murder, where the jury informed the court that there was no prospect of an agreement on a verdict, it was reversible error for the judge to remark: "Feeling as I do about the matter, I do not see any reason why a jury should disagree in the matter, * * * although I do not care to force any man, against his conscience, to agree to a verdict which he does not believe in. * * * Feeling as I do about the case, * * * I do not feel that I should discharge you,"—since such remark was calculated to impress on the jury that the verdict should be one of guilty.
12. If the evidence discloses that defendant was commanded to commit the homicide by one who threatened to take defendant's life if he refused, and, believing the threat would be executed, to save his own life, he killed the deceased, who was, when slain, a mile distant from the place where the threat was made, then defendant is guilty of a deliberate murder.

Appeal from District Court, Fergus County; Dudley Du Bose, Judge.

James Eli Fisher was convicted of murder. From a judgment and an order denying a new trial he appeals. Reversed.

Mr. Wm. M. Blackford, Messrs. Stranahan & Stranahan, Mr. William H. De Witt, and Mr. T. Bailey Lee, for Appellant.

Mr. C. B. Nolan, Attorney General, for the State.

With reference to the statements of the court objected to and alleged by the appellant to be oral instructions and *per se* error, we submit that a proper construction of Sec. 371 of the Code of Civil Procedure providing for stenographers who shall take full notes of all the proceedings given or had at the trial, together with the section (1080 Code C. P.) directing that the court shall instruct the jury in writing, make the laws of our state substantially as the California law with reference to oral instructions, that is, permitting them to be given when taken down by the stenographer. (*State v. Preston*, 38 Pac. Rep., 694.)

Did it not cease to be an oral charge, if part of the charge at all, when it was taken down by the stenographer? The court offered to let the jury have the charge written if the defendant's counsel asked for it, but he sat silent and did not make the request.

The jury itself did not ask for it, therefore its absence was certainly not prejudicial to the defendant and could not have influenced their verdict. (*People v. Cockran*, 61 Cal., 552.)

It has also been held that a failure to charge in writing, although required by the statute to do so even though it be erroneous, is no ground for reversal where no prejudice could have resulted to the appellant therefrom. (*Com. v. Barry*, 11 Allen (Mass.) 263; *Greathouse v. Summerfield*, 25 Ills. App., 296; *Walsh v. St. Louis Drayage Co.*, 4 Mo., 339; *Hogell v. Lindell*, 10 Mo., 484.)

In *Com. v. Barry*, Bigelow, C. J., of Massachusetts, said: "It is not the province of the defendant to assert or maintain a rule of law where the omission to observe it has been the cause of no injustice to him."

Besides, in *People v. Leary*, 39 Pac. Rep., 24, which was a case where the stenographer was not present when the jury returned into court, in a murder case, for further instruction; and consequently cannot be urged to have been decided on account of the permission given under the California statute to instruct the court orally when the same is taken down by the stenographer, the court held that *as nothing whatever was said to the jury except what in substance and more in detail had been told them before in the charge of the court*, that there was no violation of the provisions of the California law requiring the charge of the court to be in writing or taken down by the official reporter.

And at all events "by agreement of both parties" oral instructions can be given. (Section 2070, Penal Code; 11—A. & E. E. Prac. & Pr., 261.)

Defendant's counsel was silent and thereby gave his consent, and as suggested by the trial court in overruling the motion for a new trial, "The day is past in criminal procedure when counsel for the defendant can sit silent and then take advantage of his silence."

Silence raises a presumption that consent has been given. (Bouvier's Law Dict., I-400; and *consensus tollit errorem*.)

There was no coercion of a verdict in this case. The court

simply suggested that the case was an expensive one for the county to try, and was not a case where he thought the jury ought to disagree. He was entirely fair, saying that they should either acquit the defendant or find him guilty, and was particularly careful in saying to them, "I don't care to force any man against his conscience to agree to a verdict which he does not believe in. * * *" (*Horman v. State*, 70 Wis., 456; *Douglas v. State*, 4 Wis., 393; *State v. Gorman*, 67 Vt. 365.)

And we submit that the law is well established that the court may urge to the jury as reasons for agreeing on a verdict the time and expense involved in the trial, and the time and expense that a new trial will entail, without it being error. (*Allen v. Woodson*, 50 Ga., 63; *East Tenn. Ry. Co. v. Winters*, 85 Tenn., 240; *Pierce v. Rehfuess*, 35 Mich., 53; *Kelly v. Emory*, 75 Mich., 147; *Clinton v. Howard*, 42 Conn., 310; *Frandsen v. Chicago Ry. Co.*, 36 Iowa, 372; *State v. Gorman*, 67 Vt., 371; *State v. Horman*, 70 Wis., 448.)

The trial judge is vested with large discretion in the conduct of judicial proceedings, and he may properly admonish the jury as to the desirability and importance of agreeing on a verdict, and may urge them to make every effort to do so consistent with their conscience. (11—Encyl. Pl. and Pr., 304, and cases cited; *German Savings Bank v. Citizens Nat'l Bank*, 63 Am. State Rep., 399.)

It is usually for the interest of both parties, or at least should be, that when a case has been fairly tried and submitted upon the merits to a jury that they should agree. The court, in urging the jury to agree, was but acting in the performance of a highly commendable duty, and an examination of the case of *People v. Kindleberger*, 100 Cal., 368, on which appellant relies, will demonstrate that there the court held that the "remarks of the judge could not fail to create the impression that he thought the jury ought to convict upon the evidence before them, * * * and that unless it appears that it could not have been so understood we cannot say that the charge was without prejudice to the defendant."

In this case, however, the court did not make any remark that could possibly create the impression that he thought the jury ought to convict the defendant, but simply urged them to agree "as to the guilt or *innocence* of the defendant," and we submit this is not error.

MR. JUSTICE PIGOTT delivered the opinion of the Court.

James Eli Fisher, accused of the murder of one John Allen, and convicted of murder of the first degree, has appealed from the judgment imposing death and from the order denying his motion for a new trial.

1. That the evidence is not sufficient to sustain the verdict is one of the assignments upon which the defendant asks for a reversal. It is argued that the corroboration of the alleged accomplice, James Calder, was not such as the law requires. Upon this point it is enough to say that there are many items of evidence which in themselves, and without the aid of the testimony of James Calder, tended to connect the defendant with the commission of the crime,—indeed, parts of his own testimony have such tendency; and, secondly, the jury might have found from the evidence that James Calder was not an accomplice in the murder of Allen, in which event a conviction could rightly be had upon the uncorroborated testimony of this witness, who deposed to facts from which the jury might have reasonably deduced every inference necessary to establish the guilt of the defendant.

2. The court instructed the jury that the defendant "is either guilty of murder in the first degree or is not guilty at all," and withheld from their consideration murder of the second degree and manslaughter. The evidence tending to prove that the defendant, with his own hands, killed Allen, is wholly circumstantial or indirect, as defined by section 3109 of the Code of Civil Procedure: "Indirect evidence is that which tends to establish the fact in dispute by proving another, and which, though true, does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence. For example, a witness proves an

admission of the party to the fact in dispute. This proves a fact, from which the fact in dispute is inferred." No witness testified that he saw the decedent slain. In this respect the evidence is wholly indirect. James Calder swore that one William Wallace Calder commanded the defendant to go and kill Allen, who was about a mile away from the place where the command was given; that the defendant, carrying a rifle, went in the direction of Allen; that in a few minutes the report of the discharge of a gun was heard; and that when the defendant returned he informed the witness that he had killed Allen, whose dead body was found immediately thereafter, lying in his own blood, with a bullet hole through the skull. The defendant testified that William Wallace Calder said he (William) was going to kill Allen, that defendant and James Calder a short time afterwards heard the report of a gun, and when William returned he said he had shot and killed Allen. The jury were not bound to believe James Calder. They were at liberty to believe all, a part, or none of his testimony connecting the defendant with the perpetration of the crime. If they did not believe any of it, there was, nevertheless, as the record shows, sufficient evidence remaining to warrant the jury in finding the defendant guilty of murder in either degree. Even if all the testimony of James Calder were accepted as true, still the inference to be drawn therefrom is not necessarily that the murder was deliberate; in other words, the testimony of James Calder, if true, does not require the inference that the murder was deliberate, nor does the law deduce such presumption. What occurred at the time Allen was killed, and the state of the defendant's mind, were to be found by the jury from the evidence. If all the testimony of James Calder be disregarded, there would be sufficient evidence remaining to warrant a verdict of guilty of murder with or without the element of deliberation. As was said in *State v. Calder*, ante p. 504, 59 Pac., 904: "Where the proof of guilt on a trial for deliberate murder is to be deduced from circumstantial evidence alone, the court should ordinarily, and perhaps always, charge the jury as to murder

of the first and second degrees, and should also charge as to manslaughter whenever there is any evidence tending to negative the presence of malice; for in such cases the circumstances may permit of inferences tending to show the commission of different grades of felonious homicide. If the killing was unlawful only, manslaughter is the crime; add to the element of unlawfulness malice aforethought only, and murder of the second degree is the crime; and, lastly, add deliberation to unlawfulness and malice aforethought, and murder of the first degree is the crime. Even in cases depending for proof of guilt largely or chiefly upon direct evidence, the omission to instruct with respect to murder of the second degree is a dangerous practice, and would in most cases constitute error sufficient to reverse a judgment convicting the defendant of the higher crime; the reason being that the question of fact of whether or not the element of deliberation was present is, save in very exceptional cases, to be determined not by the court, but by the jury."

Section 2081 of the Penal Code provides: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." In such cases the presumptions to be deduced and the inferences to be drawn depend upon the application of recognized principles of law to the evidence. The state having proved the killing by the defendant without evidence tending to show that the act amounts to manslaughter, or that the defendant is justifiable or excusable, the crime is presumed to be murder of the second degree. If the state would raise the crime to murder of the first degree, the burden is upon it to prove deliberation; on the other hand, if the defendant would reduce the crime to manslaughter, there must be produced evidence sufficient to create a reasonable doubt of the existence of malice. If, from the evidence, the jury believe the

killing was unlawful, and with malice aforethought, the deduction is murder of the second degree; if the murder was deliberate, the deduction is of the first degree of that crime; and if they believe that the killing was unlawful, but without malice, the deduction is manslaughter. Where the evidence shows conclusively that the defendant either committed murder or did not do the killing, then the jury ought to find the defendant guilty of murder or acquit him altogether; and the court does not err in so charging. In the case at bar the court should have instructed the jury upon both degrees of murder. There was, however, no evidence, direct or indirect, tending to reduce the felonious homicide to manslaughter; hence an instruction upon that crime was unnecessary.

The present differs from the *Calder* case in many respects. For example, there was not sufficient evidence, aside from the testimony of the accomplice, who was an eyewitness of the murder, to sustain a conviction of any grade of homicide; if his testimony was true, the defendant was guilty of deliberate murder, and, upon being sufficiently corroborated, the jury should have so found; if false, he should have been acquitted of any grade of homicide.

3. The court charged the jury in writing, and they retired to consider of their verdict. On the evening of the same day—March 29, 1899—the jury returned into court, and the following oral remarks were made by the judge (addressing counsel for the defendant): “Mr. Blackford, if you desire what I say to the jury shall be transcribed by the stenographer afterwards, and taken to them as an instruction, I am perfectly willing to have it done; if you demand it, it will be transcribed;” to which no response was made. Judge (addressing jury): “You can speak through your foreman, gentlemen. The sheriff telephoned me that you desired to see the oath that you took. What is the object of that, to begin with?” Foreman: “There seems to be some—I won’t say misunderstanding—but there seems to be a doubt in some of their minds whether we have a right to go outside of the evidence in drawing conclusions in this case,—whether we have

a right— I hardly know how to express myself.” Judge: “Whether you can consider circumstances not proven in this evidence?” Foreman: “Yes, sir.” Judge: “No. Your oath is, as soon as the jury is completed, and so forth, the following: ‘That they and each of them will well and truly try the matter in issue between the plaintiff and defendant, and a true verdict render according to the evidence.’ It is your duty, gentlemen, to take the evidence, and view it in the light of the instructions given you by the court; but, if any member of your jury knows anything outside of what has been testified here, he has no right to use that in arriving at his verdict. Is that what you mean,—some ulterior fact? or do you mean to apply common knowledge to the facts already proven by the testimony? Of course, in judging the testimony, you must use your common sense, but, for instance, suppose that one of the jurymen knew something which had not been proven against his man (not that I know that there is anything against him; this is only an illustration, gentlemen), and he would use that in saying that he ought to be convicted, or knew something good in favor of him, and therefore said that he ought to be acquitted, that would be going outside of the testimony in arriving at a verdict.” Foreman: “We have no right to consider this man Fisher’s past life? We know nothing of it, and we have no right to draw any conclusions?” Judge: “No more than as derived from the testimony as the court has given you the charge with regard to the testimony. What weight you shall give that is a question for you gentlemen to decide. In other words, you have no right to consider his past life in considering his testimony, any more than is developed by the testimony at this trial.” Foreman: “We are to take the evidence as we hear it on the stand? We have no right to consider anything else?” Judge: “No; if you believe that testimony, you have no right to take anything else. You can disregard that testimony, or believe it, as you see fit; it is a question with you. You may disbelieve any witness, but, as the court has instructed you before, the presumption is that the witness is telling the truth always. But

you can't take anything outside of the testimony given before you upon the witness stand. You can believe any part of that testimony, or disbelieve any part of it, with the presumption as the court has instructed you in the former instruction. Now, do you understand, gentlemen, that you are the sole judges of anybody's testimony that is given upon the stand? and whether you shall believe them or disbelieve them is a question which the court has nothing in the world to do with, and it is left for you twelve gentlemen to decide; and what weight, in that connection with the question that the foreman asked me, that you shall give the affidavit of the defendant as to what certain witnesses will swear to, as the court has instructed you before, is a question for you to decide. You may give it great weight, or give it no weight. The court has nothing to do with it." Foreman: "But the fact that the defendant hasn't these depositions that he speaks of should not prejudice us against him at all?" Judge: "No." Foreman: "I think that is all." Judge: "Well, gentlemen, you can retire. It is a question of the testimony here in the whole case. You should consider the circumstances surrounding everything in this matter, and decide it. The court cannot decide any question of fact,—tell you who you ought to believe, and who you ought not to believe,—because that is strictly your province, and the law says that you must decide it, and not the court. You can retire." On the afternoon of the next day the jury again appeared, and the following colloquy occurred: Judge: "Gentlemen of the jury, have you agreed upon a verdict?" Foreman: "We have not." Judge: "Did you desire to see the court, Mr. Foreman?" Foreman: "We wished to make a statement that it is— There is no prospect that we can agree." Judge: "This is a case, gentlemen, that is an expensive case for the county to try, and it is not a case where I think a jury ought to disagree in. They either ought to find this man guilty of murder in the first degree, or they ought to find him not guilty. Feeling as I do about the matter, I do not see any reason why a jury should disagree in the matter, and put the county to a large

expense, although I don't care to force any man against his conscience to agree to a verdict which he does not believe in. Nevertheless, if he can be persuaded by talking with his fellow jurors as to the guilt or innocence of this defendant, so that they all may agree, I should much prefer it. Of course, it is no pleasure for me to keep the jury together, nor have I any desire to inflict punishment upon men who are simply doing their duty as citizens of the county; but at the same time it is as much my duty to see that there is a verdict, if possible, in this case, as it is your duty to conscientiously consider the matter before you. Feeling as I do about the case, as I have stated, I do not feel that I should discharge you. So you can retire, gentlemen, and I will be here at any time if you desire further instructions upon the matter, or you arrive at a verdict. Before you gentlemen retire, is there any question that seems to be bothering you that you desire any further instructions upon as to the law than the court gave you yesterday?" Foreman: "Not that I know of." Judge: "You can retire, gentlemen." On March 31st the jury again appeared in court, this time at the request of the judge, who told them that the case was so important that he did not feel justified in discharging them at that time, saying, also, that he desired no juror to be forced to a conclusion except by legitimate argument and discussion. On the same day the jury found the defendant guilty.

None of the remarks made on any of the three occasions were reduced to writing. All were taken in shorthand by the stenographer, but were not extended until after the verdict was returned. The defendant excepted to the action of the court, and assigns error thereon. Subdivision 5 of section 2070 of the Penal Code prescribes that the court must charge the jury as provided in subdivisions 7, 8, and 9 of section 1080 of the Code of Civil Procedure, which declares that the court shall charge the jury in writing. Subdivision 6 of section 2070, *supra*, also prescribes that the court must not "in any case make any oral comments to the jury on the instructions, unless by agreement of both parties. All instruc-

tions given and refused must be filed among the papers of the case." Section 1085 of the Code of Civil Procedure, which is applicable to civil cases only, provides that if, after the jury have retired to deliberate, there be a disagreement among them as to the testimony, or they desire to be informed of any point of law, the information must be given in writing or taken down by the stenographer; whereas section 2123 of the Penal Code provides that such information, when required in a criminal action, must be given in the presence of the county attorney and the defendant and his counsel, omitting the provision contained in section 1085, *supra*, that the information must be given in writing or taken down by the stenographer, and leaving that matter to be regulated by subdivisions 5 and 6 of section 2070, *supra*, of the Penal Code. The attorney general contends that the silence of counsel for the defendant when the judge offered to have what he was about to say transcribed thereafter and taken to the jury as an instruction was an agreement or assent to the offer made on March 29th. Not so. From silence assent to a proposed course may often be inferred in fact or presumed in law; but it never should be so inferred or presumed unless the person or party remains silent when he ought to speak. Were it provided that the instructions and the comments thereon may be oral unless the defendant asks that they be reduced to writing, then, manifestly, oral instructions and comments would be proper, if not objected to because unwritten, and a failure to make seasonable objection would constitute assent, or, rather, would be a waiver of the right to complain thereafter. But by section 2070, *supra*, the court is commanded to charge the jury in writing, and is forbidden to make oral comments upon the instructions, unless by agreement of both the state and the defendant. This provision requires expression to be given to the assent of the defendant, and his mere silence, or that of his counsel, may not be taken as evidence of the consent. Duty did not demand objection; no legal obligation rested upon the defendant to speak; on the contrary, the court, if it would orally instruct the jury or

make oral comment upon the charge already given, was under obligation to secure the consent or agreement of the defendant thereto. The judge may not create or impose such a duty by saying (in effect) to counsel for the defendant: "I purpose giving oral instructions and making oral comments upon the charge already given. If you desire my remarks to be transcribed hereafter by the stenographer, and taken to the jury, I am perfectly willing to have it done. The statute forbids oral instructions and prohibits my making any oral comments on the written charge, unless by your consent. Now, if you do not express objection, I shall consider your silence as consent." Consent to an oral charge, or to any modification of or comment thereon, may not be inferred from the silence of the defendant or his counsel. That such is the rule seems clear; it is supported by many cases, a few of which we cite: *People v. Chares*, 26 Cal., 78; *People v. Kearney*, 43 Cal., 384; *People v. Prospero*, 44 Cal., 186; *People v. Hersey*, 53 Cal., 574; *People v. Bonds*, 1 Nev., 33.

Subdivisions 5 and 6 of section 2070, *supra*, requiring the charge of the court in a criminal action to be in writing, and prohibiting oral comments on instructions unless by agreement of the parties, are mandatory, and a violation of them constitutes error. Did the court either give the jury oral instructions or make oral comments upon the charge, the statements having been taken down in shorthand by the stenographic reporter? The attorney general insists that when section 371 of the Code of Civil Procedure, which provides that the official stenographer shall take full notes of all the proceedings at the trial, is considered as supplementing sections 2070 and 2123, *supra*, the statutes of Montana are, in substance, the same as those of California relating to oral instructions, and should be interpreted as are the latter. We do not agree with him, nor with the holding of the supreme court of Idaho upon this question in *State v. Preston*, 38 Pac., 694. In subdivision 6 of section 1093 of the present Penal Code of California is the following provision: "If the charge be not given in writing, it must be taken down by the

phonographic reporter," which recognizes a distinction between a written charge and one merely taken in shorthand by the stenographer. The charge is oral if not in writing, even though it be taken down by the stenographer. Such oral charge, when so taken down, is permitted by the statute of California, but there is no similar statute of Montana. The assertion that a charge not in writing becomes written when phonographically reported as the words fall from the lips of the judge, carries its own refutation. The plain intent of subdivisions 5 and 6 of section 2070, *supra*, is to require that the charge must be in writing at the time of its delivery, and must be read to the jury as written, thus insuring its preservation as given to the jury; and so, for like reason, with the information mentioned in section 2123. The fallibility of stenographic reporters is probably another reason why the legislative assembly of this state has not as yet provided that the notes of the stenographer may take the place of a written charge. The statute was probably intended also as a means conducive to great care and caution in framing the instructions,—elements not always attending the giving of those which are unwritten.

In the oral instructions and comments by the judge, the court committed error prejudicial to the defendant: Before the trial the defendant had applied for a continuance in order to obtain depositions, setting forth in his affidavit that certain witnesses, if present, would testify that his general reputation and character for morality was good in the community of his residence, and the state admitted at the trial that the witnesses, if present, would so testify. In the written charge in respect to this matter the law was correctly declared, except in the following clause: "The fact that a man, prior to the alleged commission of a crime, has had a good character, if you believe that he has proven by competent evidence that he has had a good character in the neighborhood in which he lives, always goes to his credit." The court is the judge of the competency of the evidence, the jury of its weight. This error may have tended to raise in the minds of the jurors the

question of whether the evidence which the state admitted would have been given if the witnesses were present and testifying was competent to prove character. This appears from the question asked by the foreman, the jury desiring to know whether they had the right to consider the defendant's previous life: "We have no right to consider this man Fisher's past life? We know nothing of it, and we have no right to draw any conclusions?" "We are to take the evidence as we hear it on the stand? We have no right to consider anything else?" In answering, the judge said: "No. * * * But you can't take anything outside of the testimony given before you upon the witness stand. * * * Now, do you understand, gentlemen, that you are the sole judges of anybody's testimony that is given upon the stand? * * * and what weight, in that connection with the question that the foreman asked me, that you shall give the affidavit of the defendant as to what certain witnesses will swear to, as the court has instructed you before, is a question for you to decide. You may give it great weight, or give it no weight. The court has nothing to do with it." Foreman: "But the fact that the defendant hasn't these depositions that he speaks of should not prejudice us against him at all?" The judge answered, "No." By these remarks the jury were misdirected. They were bound to accept the affidavit of the defendant as true, it was not to be weighed by the jury; the affidavit stated that certain witnesses, if present, would testify to good character, and the state admitted such to be the fact. In considering the question of the defendant's guilt, and as bearing upon it, the weight to be given (not to the affidavit of the defendant, but) to the evidence of good character, was for the jury. When the judge told the jury that they must consider nothing outside of the testimony given before them upon the witness stand, and that the defendant's failure to produce the depositions of the character witnesses should not prejudice the jury against him, the error was emphasized. True, the written charge, with the exception already pointed out, contained a correct and sufficiently full statement of the law upon the sub-

ject, but the oral instructions and comments were repugnant to the charge.

The oral statements of the judge made to the jury on the second day after their retirement contained the following, in answer to the remark of the foreman that there was no prospect of an agreement: "This is a case, gentlemen, that is an expensive case for the county to try, and it is not a case where the jury ought to disagree in. They either ought to find this man guilty of murder in the first degree, or they ought to find him not guilty. Feeling as I do about the matter, I do not see any reason why a jury should disagree in the matter, and put the county to a large expense, although I don't care to force any man against his conscience to agree to a verdict which he does not believe in. * * * Feeling as I do about the case, as I have stated, I do not feel that I should discharge you." The judge should not have addressed the jury as he did. It was improper for him to direct the attention of the jury to the expense incident to a new trial as a reason why they should reach a verdict. Whether this, of itself, requires a reversal, we do not decide. The more serious error lies in the intimation that the judge believed the defendant guilty. If he believed that the evidence was not of sufficient weight to sustain a verdict, the manifest duty of the court was to advise an acquittal,—in other words, if the judge was of the opinion that the defendant, if convicted, should be granted a new trial because of the insufficiency of the evidence, the jury should have been advised to return a verdict of not guilty. (Section 2096, Penal Code; *State v. Welch*, 22 Mont., 99, 55 Pac. 927.) If, in the opinion of the judge, the evidence was sufficient to warrant the submission of the case to the jury, the weight of the evidence was not for him to determine. It seems clear, also, that by the impromptu oral charge and comments the jury were given to understand that the judge entertained no doubt of the verdict which ought to be rendered, and the trend of his remarks was certainly calculated to impress the jury that, in his opinion, the verdict should be one of guilty. His opinion upon

the weight of the evidence and the guilt of the defendant was not expressed in direct language, but it was implied. We think the correct rule is announced in *People v. Kindleberger*, 100 Cal., 368, 34 Pac., 853: "When, upon the trial of a defendant, the evidence is clearly insufficient to justify a verdict of guilty, it is the duty of the judge to so inform the jury, and to advise a verdict of acquittal. This power is sometimes exercised by courts, and is one so frequently invoked in the trial of criminal cases that its existence may be regarded as a matter of common knowledge upon the part of jurors of ordinary intelligence and experience; and this fact is not to be lost sight of in considering the impression likely to have been made upon the jury by the charge of the judge in this case. To any one knowing that it is the duty of the court to advise an acquittal if the evidence is such that, in the opinion of the judge, twelve honest men would have no right to convict him, the remarks of the judge in this case could not fail to create the impression that he thought the jury ought to convict upon the evidence before them. But it is not necessary that we should be able to say that the jury must have so understood the charge. Unless it appears that it could not have been so understood, we cannot say that the charge was without prejudice to the defendant. The court has no right, except when advising an acquittal, to give any expression of its opinion as to the weight of evidence, or to tell the jury that the evidence is so clear that they, as honest men, ought not to disagree, which is, in effect, the same as telling them that there is no conflict in the evidence, and that, as honest men, they can render but one verdict."

4. As the cause must be remanded for a new trial, we notice the only other question which is of importance. It is earnestly insisted that there was evidence tending to prove that the defendant was commanded to kill Allen by William Wallace Calder, who threatened to take the life of the defendant if he refused; and that the defendant, believing that Calder would execute his threat, to save his own life killed Allen, who was, when slain, a mile distant from Calder and from the

place where the threat was last made. If the evidence disclosed that the defendant killed Allen under these circumstances, then, at the common law, he would have been, and by the statutes of this state he is, guilty of a deliberate murder. (*Arp v. State*, 97 Ala., 5, 38 Am. St. Rep., 137, 12 South., 301, 19 L. R. A., 357; *People v. Repke*, 103 Mich., 459, 61 N. W., 861; *Regina v. Tyler*, 8 Car. & P., 616; section 30, subdivision 8 of the Penal Code.) The instructions touching this phase of the case and kindred matters were, to say the least, as liberal toward the defendant as any that could be given without misdirection in his favor.

The judgment and the order denying the motion for a new trial are reversed, and the cause is remanded.

Reversed and remanded.

BOSTON & MONTANA CONSOL. COPPER & SILVER
MINING CO., APPELLANT, v. MONTANA ORE
PURCHASING CO., ET AL., RESPONDENTS.

[No. 1,461.]

[Submitted January 18, 1900. Decided February 8, 1900.]

Injunction—Pendente Lite—Discretion of Court.

It is not an abuse of discretion to deny an application for an injunction *pendente lite*, where it does not appear that the grievances complained of will work irreparable injury pending the determination of the suit.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

ACTION by the Boston & Montana Consolidated Copper & Silver Mining Company against the Montana Ore Purchasing Company and others. From an order denying an application for an injunction *pendente lite*, plaintiff appeals. Affirmed.

Messrs. Forbis & Evans, Mr. Ransom Cooper, and Mr. William H. De Witt, for Appellant.

23 557
28 15

Messrs. McHatton & Cotter, Messrs. Clayberg, Corbett & Lee, Mr. Chas. R. Leonard, and Mr. R. B. Smith, for Respondents.

PER CURIAM.—We have examined the record in this case, and carefully considered all the points made by counsel. It involves the right of the plaintiffs to an injunction *pendente lite* restraining the defendants from passing to and fro through a fractional portion of the Johnstown mining claim, belonging to the plaintiff, by means of underground workings. The lower court heard the application for an injunction *pendente lite*, and denied it. Plaintiff appeals.

It does not appear that the grievances complained of will work irreparable injury to plaintiff pending the determination of the suit. There was, therefore, no clear abuse of discretion. Order affirmed. *Remittitur* forthwith.

Affirmed.

23 558
29 230
23 558
34 401

DANFORTH, RESPONDENT, v. LIVINGSTON, APPELLANT.

[No. 1,458.]

[Submitted January 11, 1900. Decided February 10, 1900.]

Taxation—Assessment—Valuation—Appeal—Presumption.

1. Since there is no statute allowing an appeal from the action of the county assessor and board of county commissioners, sitting as a board of equalization, in preparing the assessment roll, under Political Code, Sections 3700 *et seq.*, 3730-3735, providing for valuing property for the purpose of taxation in counties where the assessed valuation is less than \$8,000,000, courts will not interfere with the action of these officers where it does not appear that the assessor did not act fairly and honestly, or that the board of equalization did not give plaintiff a fair hearing, and where the only ground on which relief is sought is that the valuation of plaintiff's property was fixed at \$14,250, whereas its actual value was admittedly only \$9,700.
2. The fact that the assessor fixed the valuation of property at \$14,250, whereas its actual value was only \$9,700, is not, standing alone, such an excess in the valuation as to justify a conclusive presumption of fraud or malice on the part of the assessor.

Appeal from District Court, Park County; Frank Henry, Judge.

INJUNCTION by James A. Danforth against Alex. Livingston, treasurer and collector of Park county, Montana, to

restrain the collection, by sale, of taxes due on real estate belonging to the plaintiff. From a judgment for plaintiff, defendant appeals. Reversed.

STATEMENT OF THE CASE.

Application for an injunction to restrain the collection, by sale, of taxes due for the year 1898 upon real estate belonging to the plaintiff. The complaint, after setting forth the official character of the defendant, substantially alleges the following: That on the first Monday in March, 1898, the plaintiff was, and at all times since has been and still is, the owner of certain lots situated in the town of Livingston, county of Park, state of Montana; that the duly elected, qualified and acting assessor of said county, having listed and valued the real estate in said county for the purpose of taxation for the year 1898, entered the same upon the assessment roll thereof; that plaintiff's property was entered upon said roll, and valued at \$14,250; that the assessor thereafter delivered said roll to the county clerk of said county, duly verified as required by law; that thereafter, and during the time provided by law, the board of county commissioners of said county sat as a board of equalization to equalize the said assessment roll; that on the 28th day of July, 1898, and while said board was sitting as a board of equalization, the plaintiff, by his duly appointed agent, J. E. Swindlehurst, appeared before said board, and filed an affidavit, setting forth that the full cash value of said real estate, on the first Monday in March, 1898, was the sum of \$9,700 only; that the said J. E. Swindlehurst, acting for the plaintiff as aforesaid, then and there asked the said board to reduce the assessment on the said property, as made by the assessor, to its actual cash value; that the full cash value thereof was in fact \$9,700, as stated in said affidavit; that the said board refused to allow the request of the plaintiff, and to make any reduction in the assessment whatsoever; that the total levy of taxes of said county for the year 1898, for all purposes,—state, county and municipal,—as fixed by the board of county commissioners, was

33 mills on each dollar of valuation of the taxable property; that this levy included also the property of plaintiff at the valuation fixed by the assessor as aforesaid; that thereafter the county clerk of said county computed the amount to be paid by this plaintiff as his proportion of the taxes for that year at the sum of \$470.25, and thereupon delivered the assessment roll, containing said assessment, to the defendant herein for the purpose of collection; that thereupon the defendant published a notice as required by law, that the taxes for 1898, with costs and penalties added, would be delinquent, if not paid on or before the first Monday in December, 1898; that the plaintiff did not pay the tax so levied against his real estate, and that the same has been declared delinquent; that the said defendant, as treasurer, now threatens to collect the same, with the 10 per cent. penalty and costs added thereto; that on the 22d day of December, 1898, the said defendant, as county treasurer, advertised the plaintiff's said property for sale, as provided by law in such case, to enforce the collection of the said tax due and delinquent as aforesaid, and will proceed to sell the same, unless restrained from so doing by an order of this court; that on the third day of December, 1898, this plaintiff, by his duly authorized agent, tendered and offered to pay to the defendant, as such county treasurer, the sum of \$321, this being the full amount of tax due from the plaintiff upon his said real estate, at its full cash value; that the defendant refused to accept said sum in full payment of the amount due from plaintiff; and that this plaintiff has always been, and still is, ready to pay said sum to the defendant, and now pays the same into court, for the use and benefit of the said treasurer, as the full amount due from him. Judgment is thereupon demanded that the defendant be required to accept the said sum of \$321 as full payment of the tax due from plaintiff for the year 1898; and that an injunction issue perpetually restraining defendant from proceeding further with the threatened sale of plaintiff's property.

To this complaint a general demurrer was interposed. After argument, the court below, on July 6, 1898, overruled

the demurrer, and granted the defendant 30 days from that date in which to file his answer. On the 18th day of July thereafter, the defendant having elected to stand upon the demurrer, the court entered judgment in accordance with the prayer of the complaint, directing the defendant to accept the sum of \$321 as the full amount due from the plaintiff, and perpetually enjoining him from proceeding further with the sale. From this judgment the defendant has appealed.

Mr. H. J. Miller, and Mr. C. B. Nolan, Attorney General,
for Appellant.

Messrs. Smith & Wilson, and Mr. A. P. Stark, for Respondent.

The contention of the appellant's counsel that the action of the assessor and the board of equalization in the valuation of property is judicial, and cannot therefore be attacked in a collateral proceeding, is a fundamental error. (Constitution, Article VIII, Sec. 1; *Hedges v. County Commissioners*, 4 Mont. 280; *Bardrick v. Dillon* (Okl.), 54 Pac. 785; *State Auditor v. R. R. Co.*, 6 Kan. 507; *Lerris v. Higley*, 20 Wall. 375, 22 L. C. B. page 385.) We take it that the remedy by injunction in the case at bar is expressly given by Sec. 4023 of the Political Code of Montana. (*Comm'rs v. Lang*, 8 Kan. 284; *Griffith v. Watson*, 19 Kan. 23; *Stiles v. City of Guthrie*, 3 Okl. 26, 41 Pac. 383; *Wilson v. Longendyke*, 32 Kan. 270; *Bardrick v. Dillon* (Okl.), 54 Pac. 785.) We believe it is a general rule in all the states and territories having statutes similar to ours, that where property has been assessed for more than its actual value, and the property owner has tendered and offered to pay the tax collector the amount of taxes due upon his property at the legal rate of taxation, upon its true value, courts of equity will enjoin the collection of the excess, provided the taxpayer has applied to the board of equalization for redress and has been refused. (*First National Bank of Missoula v. Bailey*, 15 Mont. 301; *Green Mountain Stock Ranching Co. v. Savage*, 15 Mont. 189; *N.*

P. Ry. Co. v. Patterson, 10 Mont. 90; *Helton v. The Commercial Natl. Bank*, 101 U. S. 143, L. Co.op. B. 25, 961; *Cummings v. Natl. Bank*, 101 U. S. 153, L. Co.op. B. 25, 903; *Chicago B. & Q. R. Co. v. Board of Comm'rs*, 39 Pac. 1039 (Kan.); *Wallace v. Bullen*, 52 Pac. 954 (Okl.); *Dakota Loan & Trust Co. v. County of Coddington* (S. D.) 68 N. W. 314; *Yocum v. Natl. Bank* (Ind. Sup.) 43 N. E. 231.)

PER CURIAM.—Under the provisions of the statute, the duty of valuing property for the purpose of taxation, in counties of the class to which Park county belongs (those in which the assessed valuation is less than \$8,000,000), is confided to the skill and judgment of the assessor, subject, however, to revision, upon proper application, by the board of commissioners of the county, sitting as a board of equalization. (Political Code, Secs. 3700 *et seq.*, 3780–3785; Laws 1897, pp. 195, 196.) The assessor must ascertain the full cash value thereof, and so list it upon the assessment roll, under proper headings. (Political Code, Secs. 3690, 3724.) Thereupon the board of commissioners sit as a board of equalization to revise and correct the roll thus made up, but this board has no power to raise or lower the valuations fixed by the assessor, except as provided in Secs. 3780–3785, *supra*. There is no provision of the statute allowing any appeal from the action of these officers. It seems clear, therefore, that it was the intention of the legislature, acting under the power vested in it by the Constitution (Constitution, Art. XII, Secs. 1, 16, 18), to make their action final, and to deny to the courts the power to review their judgment or to assume supervisory control over their proceedings. Accordingly, under the great weight of authority, courts will ordinarily not interfere with the action of these officers to correct mere errors of judgment. It is only where they act fraudulently or maliciously, or the error or mistake is so gross as to be inconsistent with any exercise of honest judgment, that courts will grant relief. (Cooley on Taxation (2d Ed.) pp. 409, 410; Welty on Assessment, Sec. 137; 2 Desty on Taxation, 655; *Republic Insur-*

ance Co. v. Pollak, 75 Ill. 294; *Porter v. Railroad Co.*, 76 Ill. 561; *Gage v. Evans*, 90 Ill. 570; *Union Trust Co v. Weber*, 96 Ill. 346; *San Jose Gas Co. v. January*, 57 Cal. 616; *Attorney General v. Supervisors*, 42 Mich. 72, 3 N. W. 260; *Wilmington C. & A. R. Co. v. Board of Com'rs of Brunswick Co.*, 72 N. C. 10; *Wade v. Commissioners*, 74 N. C. 81; *International & G. N. R. Co. v. Smith Co.*, 54 Tex. 1; *Hamilton v. Rosenblatt*, 8 Mo. App. 237.).

In the case under consideration there is no suggestion that the assessor acted otherwise than fairly and honestly, or that the board of equalization did not accord to the plaintiff a full and fair hearing. Neither is there any charge that the valuation put upon plaintiff's property is disproportionate to the values given to other property in the county of like character and situation. The ground upon which relief is sought, and upon which it was evidently granted by the court below, is the fact that the assessor fixed the valuation of plaintiff's property at \$14,250, whereas its actual value is admittedly only \$9,700. Under the authorities cited, this fact, standing alone, is not sufficient to warrant the relief sought. There is not such an excess in the valuation as to justify a conclusive presumption of fraud or malice on the part of the assessing officer. The value of property is a matter of opinion, and there must necessarily be left a wide room for the exercise of this opinion. Absolute accuracy cannot always be attained. Courts cannot be called upon, in every instance, to settle differences of opinion in this regard between the assessing officer and the property owner. Otherwise, courts would be converted into assessing boards, and, in assuming to act as such, would usurp the powers lodged elsewhere by the lawmaking branch of the government.

Counsel for respondent insist that this Court in *Cobban v. Hinds*, ante p. 338, 59 Pac. 1, impliedly recognized the contention here made by them, that an excess in valuation justifies interference by the courts by injunction to restrain the collection of a tax based thereon. Counsel are in error. The expressions used in that case merely show that the question discussed here was not then before the court for consideration.

The district court should have sustained the demurrer. Let the judgment be reversed, and the cause remanded, with directions to the court below to sustain the demurrer.

Reversed and remanded

23 564
24 511

STATE, EX REL. HICKEY, ET AL., RELATORS, v. SECOND
JUDICIAL DISTRICT COURT, ET. AL., DEFENDANTS.

[No. 1,497.]

[Submitted January 19, 1900. Decided February 9, 1900.]

Mandamus to Court—Dissolution of Injunction—Discretion.

A *mandamus* will not issue to compel a court to hear a motion to dissolve or modify an interlocutory injunction granted on order to show cause, based on the discovery of additional evidence tending to establish facts alleged in opposition to the injunction where the motion to modify is based upon the same facts and rests upon the same grounds as those which had been presented in opposition to the granting of the injunction, and where the privilege of applying for such dissolution or modification was not reserved in the order granting the injunction; such hearing being in the discretion of the court.

APPLICATION by the state of Montana, on the relation of Edward Hickey and others, for a peremptory writ of *mandamus* against the district court of the Second Judicial district of the state of Montana, in and for the county of Silver Bow, and the judges of said court, requiring said court and its judges to hear and decide a motion to dissolve an interlocutory injunction. Denied.

Mr. R. B. Smith, Messrs. McHatton & Cotter and Messrs. Clayberg & Corbett, for Relators.

Mr. T. J. Walsh, for Defendants.

PER CURIAM. *Mandamus.* The relators are the defendants in an action pending in the district court of Silver Bow county, wherein the Washoe Copper Company is the plaintiff, and in which the plaintiff alleges ownership of the Oden lode

claim, and the defendants aver their ownership in five-thirty-sixths of the Nipper lode claim, adjoining the Oden on the north. In that action the plaintiff alleges that the defendants, by means of underground workings, had penetrated the boundaries of the Oden lode claim beneath its surface, and were mining and extracting valuable ores therefrom, and, upon the filing of the complaint, obtained an order requiring the defendants to show cause why they should not be restrained from mining within vertical planes drawn downward through the boundary lines of the Oden lode claim, and at the same time obtained a peremptory restraining order. Thereafter, the application for the injunction *pendente lite*, and order to show cause why it should not be granted, was heard upon affidavits and oral testimony. It was contended by the plaintiff that the vein which defendants were then working passed obliquely out of the Oden lode claim into the Nipper lode claim, through its south side line, at a point about 100 feet west of its southeast corner, and that, pursuing such oblique course, the vein passed out of the north side line of the Nipper lode claim, and that therefore defendants were not entitled to extract ore therefrom beyond the south side line of the Nipper claim; defendants, on the other hand, contended that the vein traversed the Nipper lode claim from east to west, passing through both end lines. The court, upon the evidence adduced, continued in force the restraining order, and directed an injunction *pendente lite* to issue as prayed for upon the filing of a bond. The bond was given, and on May 27, 1899, the order of interlocutory injunction was made. Attempted appeals from the restraining order and order of injunction were dismissed by this court in *Washoe Copper Co. v. Hickey*, ante p. 319, 58 Pac. 866. On November 21, 1899, the defendants filed in that action a motion for a dissolution or modification of the interlocutory injunction, supporting the motion by an affidavit of one Tower to the effect that since the injunction was granted certain development work had been done, which tends to establish the contention which the defendants made on the hearing of the order to show cause.

The plaintiff objected to the court's entering upon a hearing of the defendant's motion to dissolve in part or modify, upon the ground that the injunction had been granted after notice and a full hearing; the court sustained the objection, and refused to entertain the motion to dissolve. The defendants then applied to this Court for an alternative writ of mandate to compel the district court and its judges to hear and decide the motion to modify the injunction, which alternative writ was issued. Upon the return and answer showing the foregoing facts, the relators ask for a peremptory writ.

It must be denied for the reason that, in the circumstances disclosed, it is not the duty of the court or judge to entertain the motion for a modification. There was no change in the facts between the time when the hearing was had and the time when the motion to modify was made,—that is to say, the latter motion is based upon the same facts and rests upon the same grounds as those which the defendants had theretofore presented in opposition to the granting of the injunction. Neither the defendants' contention nor their defense is altered; they desire to be again heard because they were now able, as is averred, to produce evidence of the existence of facts which they alleged existed at the original hearing, but had (in the opinion of the district court) then failed to establish. The facts are not different; the defendants have but secured additional evidence tending to prove them. The court or judge is not required to entertain a motion to dissolve or modify an interlocutory injunction granted upon notice or order to show cause, where the motion is based upon no other grounds or ultimate facts than those already urged in opposition to the order of injunction. This statement is but the enunciation of an elementary doctrine of the law, and is recognized in Section 878, Code of Civil Procedure, as well as in *Jones v. Thorne*, 80 N. C. 72; *Natoma Water Co. v. Clarkin*, 14 Cal. 544; *Natoma Water Co. v. Parker*, 16 Cal. 83; *Curtis v. Sutter*, 15 Cal. 260; *France v. France*, 8 N. J. Eq. 619. If the defendants desired the privilege of applying for a dissolution or modification upon the discovery of additional evidence, the

right to do so should have been created by and reserved in the order granting the interlocutory injunction.

We do not decide whether the district court or its judge is without jurisdiction to entertain the motion the hearing whereof the defendants ask this court to compel; it is sufficient to say that a hearing cannot successfully be demanded as a right. If the court or its judge is without jurisdiction, the motion cannot rightly be heard; if there is jurisdiction, permission to make the motion may be given or withheld in the discretion of the court or its judge, there being no reservation of the privilege to apply for a dissolution or modification. Here the permission was refused, and this Court cannot properly interfere to compel the granting of leave to apply for a dissolution in part or modification; so it is unnecessary to express any opinion on the question of jurisdiction to hear the application of defendants.

The motion for a peremptory writ is therefore denied, and the proceeding dismissed. Judgment is ordered to be entered accordingly.

Denied.



LIST OF DECISIONS

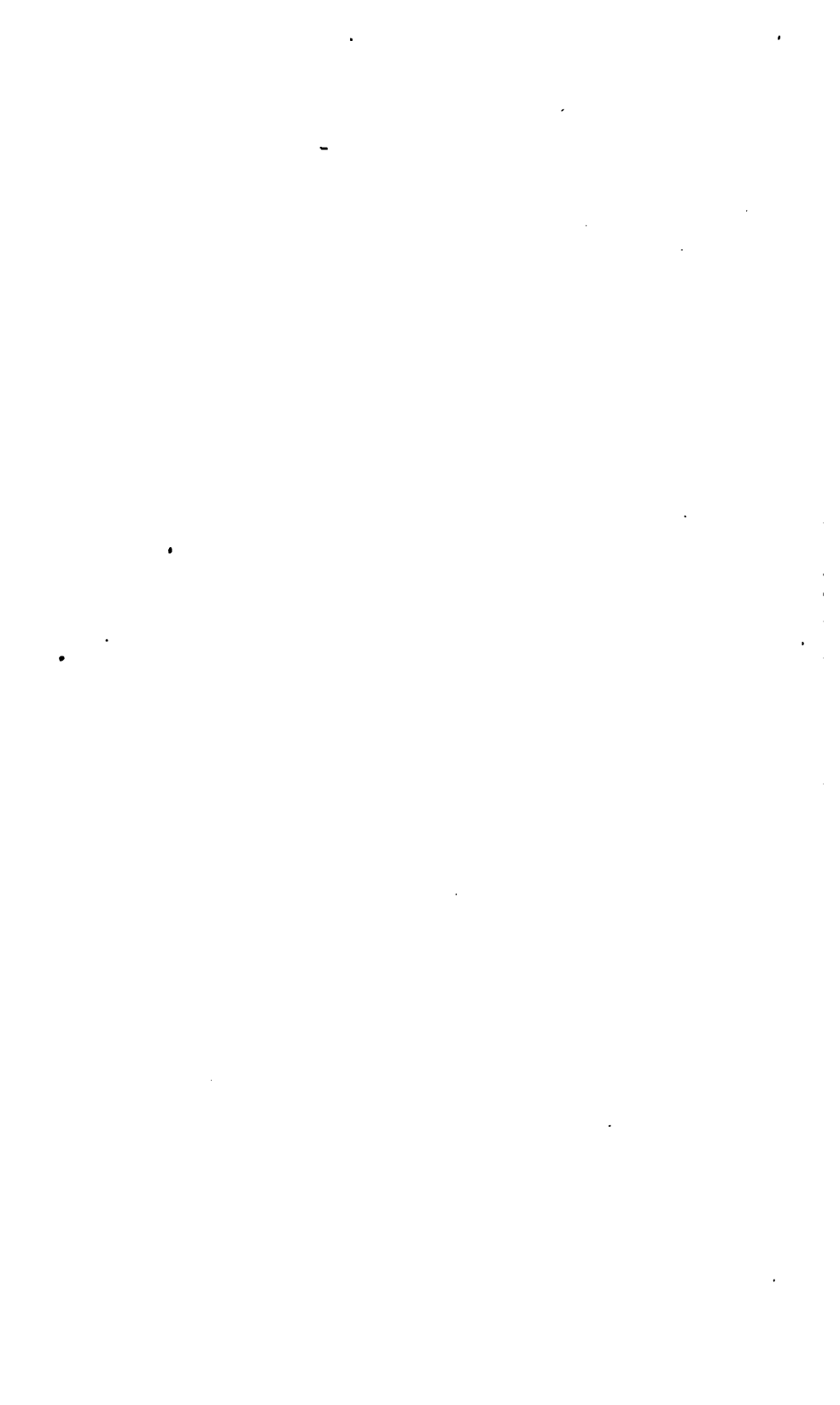
OF THE

SUPREME COURT

OF MONTANA

CITED OR COMMENTED
UPON IN SUBSEQUENT DECISIONS
OF THE COURT.

COVERING VOLUMES 1 TO 21 (INCLUSIVE)
OF THE MONTANA REPORTS.



LIST OF DECISIONS.

- ALDER GULCH CON. MINING CO. v. HAYES ET AL.**, 6 Montana, 31.
(Findings—Review) VI: 245; VII: 106, 527; IX: 588; XV: 316; XVIII: 252.
(Transcript— Rules of Supreme Court) VII: 14.
- ALDERSON v. MARSHALL**, 7 Montana, 288.
(Summons — Service—Publication) XIII: 188, 190; Distinguished XVII: 497.
- ALLPORT v. KELLEY**, 2 Montana, 343.
(Appeal—Review of Evidence) III: 379, 476; IV: 78; VI: 32, 247; VII: 106; IX: 588; XVIII: 252.
(Injunction—Attorney Fees) V: 14; Distinguished VI: 186; Distinguished XIII: 159.
- ALVORD v. HENDRIE**, 2 Montana, 115.
(Mechanic's Lien) Modified 94 U. S. 545; Distinguished II: 446; VIII: 418; XII: 529; XIX: 41.
- AMERICAN SAVINGS & LOAN ASSO. v. BURGHARDT ET AL.**, 19 Montana, 323.
(Twofold Relief in one action) XIX: 544.
(Homestead—Mortgage) XIX: 557.
- AMES & FROST ET AL. v. HESLET ET AL.**, 19 Montana, 188.
(Trust Fund) XXI: 322.
- ANACONDA COPPER MINING CO. v. BUTTE & BOSTON MINING CO.**, 17 Montana, 519.
(Injunction—Discretion) XVIII: 176, 177; XX: 448, 531, 532.
(Injunction—Tenancy in Common) XVIII: 177; Doubted XX: 526, 532; XXI: 44.
(Mining Partnerships) XVIII: 489.
- ANDERSON v. HULME ET AL.**, 5 Montana, 295.
(Pleading) VII: 233.
- ANDERSON v. O'LAUGHLIN**, 1 Montana, 81.
(Replevin—Verdict) XVI: 89.
- ANDERSON v. PERKINS ET AL.**, 10 Montana, 154.
(Written Instruments—Oral Evidence) XXI: 17, 518.
- ARNOLD v. SINCLAIR**, 12 Montana, 248.
(Record on Appeal) XIV: 62, 63, 77; XV: 555; Disapproved XIX: 561; Miscited as *Morse v. Boyde*, 11 Montana, 248; XXI: 42.
(Equity—Jury) XIV: 495; XXI: 287.
- ATCHISON ET AL. v. PETERSON ET AL.**, 1 Montana, 561.
(Water Right—Injunction) Affirmed 20 Wall. 507; III: 226.
(Water Right—Abandonment) XV: 576; XVIII: 438.
(Water Right—Appropriation) XX: 185, 186.
(Injunction—Discretion) IX: 475; XI: 159; XVII: 521.
- AUTHIER v. BENNETT BROS. CO.**, 16 Montana, 110.
(Bill of Exceptions) XVIII: 13.

- BACH, CORY & CO. v. MONTANA L. & P. CO. ET AL., 15 Montana, 345.
(Judgment on the Pleadings) XVII: 471.
- BAKER ET AL. v. POWER ET AL., 7 Montana, 326.
(Chattel Mortgage—Affidavit) VII: 329; Distinguished IX: 542; X: 78; Doubted XX: 73.
- BANK OF DEER LODGE v. HOPE MINING CO., 3 Montana, 146.
(Principal and Agent) VIII: 345; IX: 197.
- BANK OF COMMERCE v. FUQUA ET AL., 11 Montana, 285.
(Appeal) XII: 313; XIII: 301, 397, 517.
(Attorney Fees) XIII: 462.
- BARBER v. BRISCOE, 8 Montana, 214.
(Judgment Roll—Bill of Exceptions) X: 298; XI: 292; XII: 312; Distinguished XII: 313; XIII: 397; XIV: 62.
(Amendment) XV: 314; XVIII: 366.
(Waiver) XVIII: 278.
- BARBER v. BRISCOE, 9 Montana, 341.
(Appealable Order) XI: 227.
(Nunc pro Tunc Order) XIV: 207.
- BARDEN v. MONTANA CLUB, 10 Montana, 330.
(Licenses) XVIII: 151.
- BARGER v. HALFORD, 10 Montana, 57.
(Appeal—Record) X: 89; XIII: 124; XVI: 116.
- BARKLEY v. LOGAN, 2 Montana, 296.
(Appeal from part of a judgment) Affirmed II: 360, 361, 363; Distinguished II: 391, 392; Distinguished III: 475; Distinguished XI: 14; Distinguished XI: 290.
- BARKLEY v. TIELEKE, 2 Montana, 59.
(Water Right—Equity) II: 436; III: 225.
(Water Right—Conveyance) XV: 572; Reviewed XV: 577, 578, 579, 580, 581, 582; Disapproved XIX: 83, 84, 85, 86.
- BARKLEY v. TIELEKE, 2 Montana, 435.
(Findings—Review) III: 379.
(Judgment Upon the Findings) X: 340; XVI: 62, 383.
- BARNEY v. HAYES ET AL., 11 Montana, 99.
(Wills—Codicil) XI: 571.
- BARRETT v. SHANNON, 19 Montana, 397.
(Taxation—Erroneous Assessment) XIX: 401.
- BARRY v. LARABIE ET AL., 7 Montana, 179.
(Sureties) XII: 17.
- BASS ET AL. v. BUKER ET AL., 6 Montana, 442.
(Record on Appeal) XI: 438.
(Pre-emption Claim—Mortgage) Disapproved XII: 283 et seq.
- BEATTY v. MURRAY PLACER MINING CO. ET AL., 15 Montana, 314.
(Appeal—Review of Evidence) XVIII: 252.
(Water Right—Appurtenance) XVIII: 438.
- BECK v. BECK ET AL., 6 Montana, 285.
(Appeal—Review—Conflict in the Evidence) XI: 274; XVI: 426.
(Appeal—Waiver) XI: 533.
- BECK v. BECK, 6 Montana, 318.
(Equity—Jury) XXI: 287.
- BECK v. O'CONNOR ET AL., 21 Montana, 109.
Cited, XXI: 118, 119.

- BECKER v. BOARD OF COMMISSIONERS, 10 Montana, 87.
(Record on Appeal) XVI: 116.
- BECKSTEAD v. MONTANA UNION R. R. CO., 19 Montana, 147.
(Fence Law—Constitutionality) XX: 233.
- BELK v. MEAGHER ET AL., 3 Montana, 65.
(Mineral Land—Location—Possession) Affirmed 104 U. S. 279; IV:
307, 534, 538, 547; XI: 95.
(Deed—Acknowledgment) XV: 579.
- BENEDICT v. SPENDIFF, 9 Montana, 85.
(Judgment by Default) IX: 408.
- BERNARD v. HERZOG, 12 Montana, 519.
(Vacating Execution Sale) XII: 523, 575.
- BERRY v. COMMISSIONERS OF MISSOULA COUNTY, 6 Montana,
121.
(Taxation—Illegal Assessment) XV: 646.
- BIELENBERG v. MONTANA UNION RY. CO., 8 Montana, 271.
(Railroads—Killing of Livestock—Negligence) VIII: 283; XI: 485, 488,
490.
(Negligence) XIII: 225.
- BILLINGS v. SANDERSON ET AL., 8 Montana, 201.
(Ejectment—Pleading) IX: 328; XIX: 493.
- BLACK v. APPOLONIO ET AL., 1 Montana, 342.
(Continuance) II: 471, 540.
(Mechanic's Lien—Statutory Construction) XII: 349, 527; XIX: 133.
- BLACK v. BLACK ET AL., 5 Montana, 15.
(Appeal—Presumption) XV: 316.
- BLACK v. CLENDENIN, 3 Montana, 44.
(Appearance—Waiver) VIII: 220.
(Summons) XII: 161; XX: 557.
- BLACK v. STORY ET AL., 7 Montana, 238.
(Ejectment) XV: 485.
- BLAKE v. DICK, 15 Montana, 236.
(Landlord and Tenant) XXI: 518, 536.
- BLESSING v. SIAS ET AL., 7 Montana, 103.
(Transcript on Appeal) VII: 483.
(Appeal—Review of the Evidence) IX: 588; XVIII: 252.
- BLOCK ET AL v. MURRAY ET AL., 12 Montana, 545.
(Mechanic's Lien—Lessor and Lessee) XV: 23; Distinguished XV: 24.
- BLUE BIRD MINING CO. v. MURRAY ET AL., 9 Montana, 468.
(Injunction—Discretion) XI: 159; XVI: 64; XVII: 521.
- BOARDMAN v. THOMPSON ET AL., 3 Montana, 387.
(Forcible Entry and Detainer—Issues) VIII: 368; XI: 87.
(Nature of Action) VIII: 369.
- BOE v. LYNCH, 20 Montana, 80.
(Evidence) XXI: 422.
- BOHM v. DUNPHY ET AL., 1 Montana, 333.
(Damages) Distinguished VIII: 318, 320, 321.
(Demurrer—Review on Appeal) XII: 557, 599.
- BOHN MFG. CO. v. HARRISON, 13 Montana, 293.
(Negotiable Instruments—Parol Evidence) XVIII: 30.
- BOLEY v. GRISWOLD, 2 Montana, 447.
(Pleading and Practice) III: 183, 184, 186; X: 470.

- (Married Women) III: 463.
BONNER v. MINNIER ET AL., 13 Montana, 269.
 (Homestead) XVIII: 26.
BOOKWALTER v. CONRAD ET AL., 14 Montana, 62.
 (Record on Appeal) Overruled XIX: 560, 561.
BOTCHER v. BERRY, 6 Montana 448.
 (Pleading) IX: 253.
BOUCHER ET AL. v. MULVERHILL, 1 Montana, 306.
 (Mining Partnership) XVIII: 489.
BOULDER VALLEY DITCH M. & M. CO. v. FARNHAM, 12 Montana, 1.
 (Equity) XIV: 53.
BOYD v. PLATNER ET AL., 5 Montana, 226.
 (Reviving a Judgment) Distinguished XXI: 578.
BOZEMAN NATIONAL BANK v. SPEITH, 8 Montana, 495.
 (Partnership—Attachment) XIV: 82.
BRADSHAW v. DEGENHART, 15 Montana, 267.
 (Verdict—Review—Conflict in Evidence) XV: 281; XVII: 359.
BRISCOE ET AL. v. McCAFFERY, 8 Montana, 336.
 (Setting Aside Judgment) IX: 408; Distinguished XII: 595.
BROADWATER ET AL. v. RICHARDS, 4 Montana, 52.
 (Jurisdiction) IV: 87; X: 450.
 (Appeal—Review of Evidence) IX: 588; XVIII: 252.
BROADWATER ET AL. v. RICHARDS, 4 Montana, 80.
 (Jurisdiction) X: 450.
 (Appeal—Review of Evidence) XV: 316.
BROOKE v. JORDAN, 14 Montana, 376.
 (Townsite—Survey) XV: 49.
BROWN v. GASTON & SIMPSON G. & S. MINING CO., 1 Montana, 57.
 (Setting Aside Default) I: 64, 66.
 (Summons—Service) XIX: 60.
BROWNELL v. McCORMICK, 7 Montana, 12.
 (Instruction) XVI: 188.
 (Attachment) XXI: 388.
BROWNFIELD v. BIER ET AL., 15 Montana, 403.
 (Finding—Conflicting Evidence) XV: 442; XVI: 431; XVII: 359.
 (Mines—Lodes—Veins) XVI: 101; Distinguished XVI: 101; XIX: 347, 348, 349, 352.
BRUNDY v. MAYFIELD ET AL., 15 Montana, 201.
 (Finding—Conflicting Evidence) XV: 281.
BRUNELL v. COOK, 13 Montana, 497.
 (Conversion—Measure of Damages) XIX: 234.
BUDD v. PERKINS ET AL., 6 Montana, 223.
 (Finding—Review on Evidence) XVI: 430.
BUDD v. POWER & CO. ET AL., 8 Montana, 380.
 (Pleading—Fraud) XXI: 519.
BULLARD v. GILLETTE, 1 Montana, 509.
 Affirmed 20 Wall. (U. S.) 579.
BURT v. COOK SHEEP CO. ET AL., 10 Montana, 571.
 (Dower—Statute of Limitations) XIX: 28.
BUTTE, ANACONDA & PAC. RY. CO. v. MONTANA UNION RY. CO., 16 Montana, 504.

- (Railroads—Crossings) XVI: 551.
 (Eminent Domain—Public Use) XVIII: 44; XIX: 466.
- BUTTE BUTCHERING CO. v. CLARKE ET AL.**, 19 Montana, 306.
 (Setting Aside Default) XXI: 164.
- BUTTE CITY SMOKE HOUSE LODE CASES**, 6 Montana, 397.
 (Mining Claim—Patent) VI: 411; VII: 67; XVII: 161, 162, 163; XXI: 349.
- BUTTE HARDWARE CO. v. SULLIVAN ET AL.**, 7 Montana, 307.
 (Chattel Mortgage—Affidavit) VII: 328; IX: 542; X: 78; Doubted XX: 73.
 (Statutes — Construction — Derogation of Common Law) IX: 541; XXI: 557.
- BUTTE HARDWARE CO. v. COBBAN**, 13 Montana, 351.
 (Trusts—Quiet Title) XV: 211.
- CAIDWELL ET AL. v. GANS ET AL.**, 1 Montana, 570.
 (Sureties—Return of Property) II: 464.
- CAMPBELL v. IRVINE**, 17 Montana, 476.
 (Assignment of Account) Distinguished XVII: 489.
- CAMPBELL ET AL. v. METCALF ET AL.**, 1 Montana, 378.
 (Injunction — Damages — Attorney Fees) II: 347, 367; V: 14; Distinguished VI: 186; Distinguished XIII: 158; Distinguished XIII: 159.
- CAMPBELL v. RANKIN**, 2 Montana, 363.
 (Mining Claim) Reversed 99 U. S. 262.
- CARLAND v. COMMISSIONERS OF CUSTER CO.**, 5 Montana, 579.
 (Board of County Commissioners) V: 368.
 (Terms of District Court) V: 375.
 (Collateral Question) XVII: 536.
- CARPENTER v. RODGERS**, 1 Montana, 90.
 (Statutory Construction—Historical Facts) II: 600.
- CARRHART v. MONTANA MINERAL L. & M. CO.**, 1 Montana, 245.
 (Administration—Real Actions) Distinguished VII: 241.
- CARRON v. WOOD ET AL.**, 10 Montana, 500.
 (Appeal—Motion for New Trial—Specification of Errors) X: 531.
 (Damages) X: 532; XI: 444; XIII: 160; XVI: 359; XVII: 448.
 (Review—Finding—Conflicting Testimony) XI: 450.
- CARRUTHERS v. COMMISSIONERS OF MADISON CO.**, 6 Montana, 482.
 (Statutory Construction) XIV: 465.
- CARTIN v. HAMMOND**, 10 Montana, 1.
 (Vendor and Vendee) XII: 9.
- CARUTHERS ET AL. v. PEMBERTON ET AL.**, 1 Montana, 111.
 (Water Right) III: 225.
 (New Trial) VI: 63.
- CASEY v. ANDERSON ET AL.**, 17 Montana, 167.
 (Adverse Possession) XVII: 176.
- CASEY ET AL. v. THIEVIEGE ET AL.**, 19 Montana, 341.
 (Evidence) XXI: 442.
- CHADWICK ET AL. v. CHADWICK**, 6 Montana, 566.
 (Courts—Jurisdiction) XV: 502; XVIII: 191, 484; XXI: 266.
- CHADWICK ET AL. v. TATEM ET AL.**, 9 Montana, 354.
 (Dower) XV: 449.

- CHARLEBOIS v. BOURDON, 6 Montana, 373.
(Courts—Jurisdiction) IX: 247.
- CHAUVIN v. VALITON, 7 Montana, 581.
(Review—Motion for New Trial—Conflict of Evidence) IX: 190, 196, 399; XI: 274; XVII: 358.
(Constitutionality of Statutes) XX: 378.
- CHOATE v. SPENCER ET AL., 13 Montana, 127.
(Summons) XX: 558, 559.
- CHUMASERO v. POTTS, 2 Montana, 242.
(Mandamus) Dismissed 92 U. S. 358; III: 366; VIII: 412; XIII: 30, 422; XVIII: 541; XXI: 474.
- CHUMASERO v. VIAL, 3 Montana, 376.
(Appeal—Review) III: 476; IV: 78; VI: 32, 223, 247; VII: 106, 527; IX: 588, 589; X: 340; XV: 316; XVIII: 252.
(Judicial Sales) V: 52; VI: 607; VII: 539; X: 198, 471.
- CITY OF BOZEMAN v. CADWELL, 14 Montana, 480.
(Pleading) XXI: 148.
- CITY OF HELENA v. ALBERTOSE ET AL., 8 Montana, 499.
(Townsites) IX: 216.
(Evidence—Objection) IX: 388; X: 484; XIV: 74; XV: 148.
- CITY OF HELENA v. BRULE ET AL., 15 Montana, 429.
(Default Judgment) Distinguished XVI: 12; XVI: 92.
(Appeal—Briefs) XVI: 303.
(Appeal from Judgment—Review) XIX: 130.
- CITY OF LIVINGSTON v. WOODS ET AL., 20 Montana, 91.
(City Treasurer—Bond—Liability) XXI: 91, 92.
- CLARK v. BAKER, 6 Montana, 153.
(Appeal from Judgment) IX: 589.
- CLARK v. NICHOLS ET AL., 3 Montana, 372.
(Foreclosure—Attorney's Fees) XI: 300.
(Frivolous Appeal—Penalty) XVI: 334.
- CLARKE v. GONU, 2 Montana, 538.
(Appealable Order) VII: 347, 350; XXI: 8.
- COBB v. SPEITH, 8 Montana, 494.
(Partnership—Attachment) XIV: 82.
- COLBURN v. NORTHERN PAC. RY. CO., 13 Montana, 476.
(Contract to Convey Land) XIV: 135.
(Decision—Collateral Attack) XVIII: 290, 291, 292, 293.
- COLEMAN ET AL. v. CURTIS ET AL., 12 Montana, 301.
(Mining Claim—Annual Representation) XV: 250; XX: 151.
- COLLIER v. ERVIN, 2 Montana, 556.
(Remand of Cause for Further Proceedings) XV: 194, 582; XVI: 62, 383.
- COLLIER v. ERVIN ET AL., 3 Montana, 142.
(Pleading—Waiver) VI: 244; VII: 111; VIII: 220.
- COLLIER v. FIELD ET AL., 1 Montana, 612.
(Promissory Note—Interest) I: 639.
- COLLIER v. FIELD, 2 Montana, 205.
(Affirmed on Rehearing) II: 320.
- COLUMBIA MINING CO. v. HOLTER ET AL., 1 Montana, 296.
(Water Rights) III: 225; VI: 38; XV: 573.
- COLUMBIA MINING CO. v. HOLTER ET AL., 1 Montana, 429.

- (Appeal—Rehearing) II: 48, 395; XVI: 383, 461.
- COMANCHE MINING CO. v. RUMLEY ET AL., 1 Montana, 201.
(Amendment of Court Records) VIII: 14; IX: 345; XIV: 207.
(Judgment Against Defendants Individually) XVI: 558.
- COMMISSIONERS OF CUSTER CO. v. COMMISSIONERS OF YELLOWSTONE CO., 6 Montana, 39.
(Judicial Functions) IX: 340.
- COMMISSIONERS OF JEFFERSON CO. v. LINEBERGER ET AL., 3 Montana, 231.
(Liability on Official Bond) IX: 138; Overruled XX: 102.
(Pleading) XVI: 334.
- COMMISSIONERS OF YELLOWSTONE CO. v. N. P. R. R. CO. ET AL., 10 Montana, 414.
(Counties—Taxation) XVIII: 391.
- CONGDON v. BUTTE CONSOL. RY. CO., 17 Montana, 481.
(Summons—Service) XVII: 543.
(Cited) XX: 209.
(Statutes—Repeal) XX: 433.
- CONKLIN v. FOX, 3 Montana, 208.
(Pleading) XVI: 557.
- CONNER v. MCPHEE, 1 Montana, 73.
(Practice—Nonsuit) XIII: 110.
- CONNOLE ET AL. v. BOSTON & MONTANA CONSOL. C. & S. M. CO. ET AL., 20 Montana, 523.
(Injunction) XXI: 45.
(Injunction—Discretion) XXI: 541.
- COPE v. UPPER MISSOURI M. & P. CO., 1 Montana, 53.
(Appeal—Brief—Waiver) III: 235.
- COURTRIGHT v. BERKINS, 2 Montana, 404.
(Appeal) Distinguished II: 581; V: 247; VII: 432; XIII: 534; XV: 146; XVI: 576; XVIII: 364.
- CREEK v. BOZEMAN WATER WORKS CO., 15 Montana, 121.
(Water Right—Conveyance) XV: 573.
(Water Right—Change of Use) XVIII: 223.
- CREEK v. Mc MANUS ET AL., 13 Montana, 152.
(Nonsuit) XIII: 291, 322; XIV: 288; XV: 179, 586; XVIII: 257; XIX: 453.
(Attorney's Fees) XV: 432; XVII: 446.
- CREIGHTON ET AL. v. HERSHFELD ET AL., 1 Montana, 639.
(Law of the Case) II: 170.
(Void Judgment) II: 360; Reversed II: 387.
- CREIGHTON v. HERSHFELD, 2 Montana, 169.
(Law of the Case) II: 502; XVIII: 519.
- CREIGHTON v. HERSHFELD, 2 Montana, 386.
(Deficiency Judgment—Docketing) XIX: 230.
- CREIGHTON ET AL. v. VANDERLIP ET AL., 1 Montana, 400.
(Contract—Collateral Security—Defence) X: 134.
- CRISWELL v. MONTANA CENTRAL RY. CO., 17 Montana, 189.
(Railroads—Master and Servant—Negligence) XVII: 219; XVIII: 495.
(Constitution—Foreign and Domestic Corporations) Reversed XVIII: 167; Distinguished XXI: 57.

- CRISWELL v. MONTANA CENTRAL RY. CO., 18 Montana, 167.
(Constitutional Law—Foreign and Domestic Corporations) XVIII:
297, 495.
- CROWDER v. McDONNELL ET AL., 21 Montana, 367.
(Pleading) XXI: 385.
- CROWLEY v. BOARD OF COMMISSIONERS ET AL., 14 Montana, 292.
(Roads) Distinguished XVII: 589.
- CUNNINGHAM v. QUIRK, 10 Montana, 462.
(New Trial) XI: 274.
(Excessive Verdict) XVII: 353.
- CURTIS v. VALITON ET AL., 3 Montana, 153.
(Interest) VIII: 320.
- DAILY v. REDFERN ET AL., 1 Montana, 467.
(Damages—Joint and Several Liability) II: 584.
- DANIELS v. ANDES INS. CO., 2 Montana, 78.
(Pleading) II: 229, 502; VI: 386; XI: 495.
- DANIELS v. ANDES INS. CO., 2 Montana, 500.
(Bill of Exceptions) III: 437; X: 298.
(Law of the Case) XVIII: 519.
- DAVENPORT ET AL. v. KLEINSCHMIDT ET AL., 6 Montana, 502.
(Injunction) VIII: 476-481; XVIII: 245; XIX: 532.
(Municipal Corporations) XIX: 535; Distinguished XIX: 536.
- DAVENPORT ET AL. v. KLEINSCHMIDT ET AL., 8 Montana, 467.
(Law of the Case) XVIII: 519.
- DAVIDSON ET AL. v. BORDEAUX ET AL., 15 Montana, 245.
(Adverse Suit) XVI: 235.
- DAVIS v. BLUME ET AL., 1 Montana, 463.
(Verdict—Review) XI: 274; XVI: 430.
- DAVIS v. CLARK, 2 Montana, 394.
(Statutory Construction) III: 250.
(Rehearing) XVI: 461.
(Ejectment—Pleading) XIX: 492.
- DAVIS v. DAVIS ET AL., 9 Montana, 267.
(Pleading) XV: 188; XVIII: 547; Distinguished XXI: 514.
- DAVIS v. FREDERICKS ET AL., 3 Montana, 262.
(Proof of Handwriting) Distinguished XX: 335.
- DAVIS v. HENDRIE, 1 Montana, 499.
(Interest on Contracts) I: 624.
- DIAMOND v. NORTHERN PAC. R. CO., 6 Montana, 580.
(Negligence) VII: 77; Distinguished VIII: 278; XI: 170, 171; XII: 217;
XVI: 178.
(Verdict—Evidence—Review) XVI: 431.
- DICKERMAN v. GELSTHORPE, 19 Montana, 249.
(Elections—Marking Ballots) XIX: 292.
- DODGE v. BIRKENFELD, 20 Montana, 115.
(Mortgage) XXI: 79.
- DODGE v. JONES ET AL., 7 Montana, 121.
(Sales—Delivery) IX: 100; XX: 228.
- DODSON EX'R v. NEVITT, 5 Montana, 518.
(Pleadings — Exceptions—Review) VIII: 222; XI: 293.
(Claims Against Estate) XVII: 438.

- DONNELL ET AL. v. HUMPHREYS, 1 Montana, 518.
 (Written Instrument—Construction—Parol Evidence) I: 694; VI: 274;
 XI: 324.
 (Appurtenances) VIII: 231; XI: 29.
- DONNELLY v. CLARK ET AL., 6 Montana, 135.
 (Setting Aside Judgment) Distinguished VII: 383; Distinguished
 IX: 88; IX: 408; Distinguished XII: 575.
- DRISCOLL ET AL. v. DUNWOODY ET AL., 7 Montana, 394.
 (Evidence—Rebuttal) XIX: 183.
- DUCIE ET AL. v. FORD, 8 Montana, 233.
 Affirmed 138 U. S. 567.
 (Pleading) X: 15; Disapproved XIX: 493-495, 500.
 (Parol Contract for Sale of Real Estate) XII: 10.
- DUIGNAN ET AL. v. MONTANA CLUB ET AL., 16 Montana, 189.
 (Mechanic's Lien) XVI: 218; XVII: 89, 188.
- DUPONT v. McADOW, 6 Montana, 226.
 (Jury) XII: 245.
- DUTRO v. KENNEDY ET AL., 9 Montana, 101.
 (Issues—Findings) XI: 405.
- DYAS v. KEATON, 3 Montana, 495.
 (Summons) XI: 421; XII: 156, 160, 161; XIX: 60; XX: 557.
- EDDY ET AL. v. KENNEY ET AL., 5 Montana, 502.
 (Chattel Mortgage) Doubted VII: 392.
- EDGERTON v. EDGERTON, 12 Montana, 122.
 (Judgments—Collateral Attack) XIX: 47, 158.
- EDWARDS v. TRACY, 2 Montana, 49.
 (Trustee of Townsite) II: 492; Modified and Distinguished IX: 215-
 217.
- ELKHORN TRADING CO. v. TACOMA MINING CO. ET AL., 16
 Montana, 322.
 (Penal Statute) XVIII: 442.
- ELLING v. KIRKPATRICK ET AL., 6 Montana, 119.
 (Attachment) XV: 173; XVI: 262.
- EMERSON v. ELDORADO DITCH CO., 18 Montana, 247.
 (Water Ditch) XIX: 76.
 (Agreed Statement of Facts) XX: 394; XXI: 127.
 (Nonsuit) XIX: 106; XXI: 126.
- ENGESSER v. NORTHERN PAC. R. R. CO., 18 Montana, 31.
 (Appeal—Brief of Disbarred Attorney) XVIII: 33.
- ERVIN ET AL. v. COLLIER, 3 Montana, 189.
 (Implied Findings) III: 229.
- FABIAN v. COLLINS, 2 Montana, 510.
 (Injunction) III: 219; XII: 403.
 (Practice) XIII: 502.
- FABIAN v. COLLINS, 3 Montana, 215.
 (Estoppel) VII: 297.
 (Waiver) XI: 533.
 (Water Right) Distinguished XIX: 76.
 (Equity—Jury) XXI: 287.

- FANT v. TANDY ET AL., 7 Montana, 443.
(Record on Appeal) VII: 483; IX: 264; XIII: 124; XVI: 116, 278.
- FEBES ET AL. v. TIERNAN ET AL., 1 Montana, 179.
(Pleading) XI: 250.
(Trespass) XIII: 508.
- FEE ET AL. v. SWINGLY ET AL., 6 Montana, 596.
(Mortgages) VIII: 55; XV: 461.
- FELTON v. WEST IRON MOUNTAIN MINING CO., 16 Montana, 81.
(Contracts—Corporations) XVIII: 15, 16, 18.
- FIRST NATIONAL BANK ET AL. v. BELL S. & C. MINING CO. ET AL., 8 Montana, 32.
(Statutory Construction) X: 69; XVI: 57; XVIII: 567; XX: 551.
(Mortgages) Affirmed 156 U. S. 470; XV: 461.
- FIRST NATIONAL BANK v. BOYCE, 15 Montana, 162.
(Costs) XVIII: 413; XIX: 447.
- FIRST NATIONAL BANK v. BULLARD, 20 Montana, 118.
(Statutory Construction—Statute of Limitations) XX: 546, 547, 550;
Disapproved XX: 551.
- FIRST NATIONAL BANK v. CUSTER COUNTY, 7 Montana, 464.
(Action Against County) IX: 152.
- FIRST NATIONAL BANK v. HALL & CO., 8 Montana, 341.
(Agency) IX: 197; XV: 535.
- FIRST NATIONAL BANK v. IRVINE, 2 Montana, 554.
(Appeals) III: 437; X: 298.
- FIRST NATIONAL BANK v. McANDREWS, 5 Montana, 251.
(New Trial—Appeal—Review) VI: 11; XII: 259.
- FIRST NATIONAL BANK v. McANDREWS ET AL., 5 Montana, 325.
(Bill of Lading) VI: 198; VII: 154 et seq.; XV: 154, 554.
- FIRST NATIONAL BANK v. NEILL ET AL., 13 Montana, 377.
(Costs) Distinguished XV: 100; XV: 175; XVII: 541; XVIII: 413.
(Statutory Construction) XVI: 59, 61.
- FIRST NATIONAL BANK v. PROVINCE, 20 Montana, 374.
(Taxation—National Banks) XX: 420.
- FIRST NATIONAL BANK v. ROBERTS ET AL., 9 Montana, 323.
(Estoppel) XIII: 359, 361.
(Specifications) XVI: 200; XVIII: 531; XX: 145, 146.
(Pleading) XIX: 493.
- FISHER v. BRISCOE, 10 Montana, 124.
(Written Contract—Oral Evidence) X: 160; Distinguished XIII: 299;
XVI: 354; XXI: 17, 518.
- FISK v. CUTHBERT, 2 Montana, 593.
(Pleading) III: 273; XIII: 34.
(Contracts of a State) Distinguished IX: 397.
- FITSCHEN ET AL. v. THOMAS ET AL., 9 Montana, 52.
(Findings—Review) XVI: 431.
- FITZGERALD v. CLARK, 17 Montana, 100.
Affirmed 171 U. S. 92.
- FLANDERS v. MURPHY ET AL., 10 Montana, 398.
(Wage Workers' Law) IX: 364; XVI: 557.
- FLAVIN ET AL. v. MATTINGLY ET AL., 8 Montana, 242.
(Mining Claims—Location, etc.) VIII: 377; X: 293.
(Mining Claim—Pleading) XII: 498.

- FLICK ET AL. v. GOLD HILL, ETC., MINING CO. ET AL., 8 Montana, 298.
 (Recording) XIV: 273; XVIII: 350.
 (Instructions) XVII: 307.
- FOOTE v. NATIONAL MINING CO., 2 Montana, 402.
 (Mining Claims—"Lode") IX: 81.
- FORD v. McMASTER ET AL., 6 Montana, 240.
 (Justification of Levy) VIII: 200; X: 394.
- FOSTER ET AL. v. HAUSWIRTH, 5 Montana, 566.
 (Remedy) VI: 207; XI: 257.
- FOSTER ET AL. v. WILSON, 5 Montana, 53.
 (Pleading) VII: 233; XV: 314, 432; XVII: 467; XIX: 130.
- FRANCISCO v. BENEPE, 6 Montana, 243.
 (Answering Over) VII: 111; VIII: 220; IX: 262.
- FRANK v. MURRAY, 7 Montana, 4.
 (Verdict—Review) XI: 274; XVI: 431.
- FREDERICKS v. CLARK ET AL., 3 Montana, 258.
 (Judgment—Appeal) III: 214; Affirmed 105 U. S. 4.
- FREDERICKS v. DAVIS, 3 Montana, 251.
 (Conveyance) III: 214, 260; Affirmed 104 U. S. 618.
- FREDERICKS v. DAVIS, 6 Montana, 457.
 (Final Judgment) VI: 461, 462; VIII: 14.
- FREER ET AL. v. SWEENEY, 8 Montana, 508.
 (Mining Claims) IX: 81.
- FROHNER v. RODGERS, 2 Montana, 179.
 (Verdict—Judgment) III: 279.
- FROMAN v. PATTERSON, 10 Montana, 107.
 (New Trial) XIX: 51.
- FULTZ v. WALTERS 2 Montana, 165.
 (Promissory Notes) XV: 552.
 (Demurrer) XVIII: 278.
- GAFFNEY MERC. CO. v. HOPKINS, 21 Montana, 13.
 (Written Contract—Oral Evidence) XXI: 518.
- GAGE v. MARYATT, 9 Montana, 265.
 (Justice's Court) XIII: 222; XIX: 511; XXI: 457.
- GALIGHER v. LOCKHART, 11 Montana, 109.
 (Mining Partnership) XVIII: 489.
- GALLAGHER ET AL. v. BASEY ET AL., 1 Montana, 457.
 Affirmed 20 Wall. (U. S.) 670.
 (Equity and Law) I: 473, 540, 643; V: 284.
 (Statutory Construction) II: 401.
 (Water Right) III: 225; XX: 185, 186.
 (Decree) III: 487.
 (Equity—Jury) V: 285; XXI: 286, 287.
- GALLATIN CANAL CO. v. LAY, 10 Montana, 528.
 (Appeal — Statement — Amendments) XIV: 123.
- GALLATIN COUNTY v. BEATTIE, 3 Montana, 173.
 (Mortgages) XV: 461; XXI: 79.
- GAMER ET AL. v. GLENN ET AL., 8 Montana, 371.
 (Mining Claim—Description) X: 298.
- GANS ET AL. v. SWITZER ET AL., 9 Montana, 408.

- (Corporations) IX: 419; XIX: 190; XXI: 559.
(Penal Statute) XVI: 330; XVII: 492; XVIII: 442; Distinguished XVIII: 443.
- GANS v. WOOLFOLK**, 2 Montana, 458.
(Nonsuit) XIII: 157; XVIII: 255.
- GARFIELD M. & M. CO. v. HAMMER ET AL.**, 6 Montana, 53.
Affirmed 130 U. S. 291.
(Mining Claim—Pleading) VI: 465; IX: 287; XII: 498, 499; XIX: 498.
(Mining Claim—Description) VIII: 246; X: 293; XX: 142.
(Mining Claim—Location) VIII: 377; XXI: 11.
(Recorded Documents—Evidence) Modified XIV: 272, 273, 274.
- GARVER ET AL. v. LYNDE ET AL.**, 7 Montana, 108.
(Nonsuit) XIII: 17.
(Demurrer—Answering Over) XVIII: 278.
- GASSERT ET AL. v. BOGK**, 7 Montana, 585.
Affirmed 149 U. S. 17.
(Conveyance of Realty) IX: 489, 490.
- GASSERT v. NOYES ET AL.**, 18 Montana, 216.
(Water Right—Abandonment) XVIII: 438.
- GERRY ET AL. v. BISMARCK BANK ET AL.**, 19 Montana, 191.
(Corporations) XXI: 549.
- GILLESPIE v. DION**, 18 Montana, 183.
(Elections—Contest) XVIII: 365; Distinguished XIX: 284.
- GILLETT v. CLARKE ET AL.**, 6 Montana, 190.
(Pleading—Prayer—Relief) VII: 282; IX: 275.
- GILLETTE v. HIBBARD ET AL.**, 3 Montana, 412.
(Appeal — Complaint — Judgment) XIV: 467.
(Statute of Limitations—Vested Rights) Modified XXI: 460, 461.
- GILLIAM v. BLACK**, 16 Montana, 217.
(Nonsuit—Appeal—Review) XVIII: 254.
- GODBE v. McCORMICK**, 1 Montana, 105.
(Jurisdiction—Statutory Construction) XI: 17, 18, 21.
- GONU v. RUSSELL**, 3 Montana, 358.
(Mining Claim—Forfeiture—Resumption of Work) XI: 94.
- GOODRICH LUMBER CO. v. DAVIE ET AL.**, 13 Montana, 76.
(Description) XV: 313; XVIII: 448.
(Judgment) XVII: 188.
- GOODWELL v. MONTANA CENTRAL RY. CO.**, 18 Montana, 293.
(Master and Servant) XVIII: 495-497.
(Fellow Servants) XIX: 139.
- GORDON v. TREVARTHAN**, 13 Montana, 387.
(Equity—Affidavit of Juror to Impeach Verdict) XVII: 140.
- GRACE M. E. CHURCH v. RICKARDS**, 16 Montana, 70.
(Appeal—Setting Aside Verdict) XX: 334.
- GRAND OPERA HOUSE CO. ET AL. v. MAGUIRE**, 14 Montana, 558.
(Mechanic's Lien) XIX: 40.
- GRANITE MOUNTAIN MINING CO. v. WEINSTEIN ET AL.**, 7 Montana, 346.
(Appeal—Transcript) VII: 361, 484; XIV: 62.
(Appealable Order) IX: 475; XIX: 447; XXI: 8.
- GRANITE MOUNTAIN MINING CO. v. WEINSTEIN ET AL.**, 7 Montana, 440.

(Appeal) VIII: 222.

GREAT FALLS WATER WORKS CO. v. GREAT NORTHERN RY.
CO., 21 Montana, 484.

(Easement—Agency) XXI: 540.

GREGG v. GARRETT, 13 Montana, 10.

(Notice—Waiver) XVI: 577.

GRIFFITH ET AL. v. HERSHFELD ET AL., 1 Montana, 66.

Affirmed: 18 Wall. (U. S.) 657.

(Practice) II: 387.

GRINNELL ET AL. v. DAVIS, 20 Montana, 222.

(New Trial—Record on Appeal) XXI: 42.

GRISWOLD v. BOLEY ET AL., 1 Montana, 545.

Affirmed: 20 Wall. (U. S.) 486.

(Order of Proof) II: 368.

(Verdict—Evidence—Review) II: 415; XVI: 430.

(Married Women) II: 452; III: 463; VI: 250; VII: 544; VIII: 182, 184;
XIII: 179.

(Instructions — Exceptions — Review) II: 466; IV: 397, 398, 524; Dis-
tinguished VII: 202-205; XII: 311; XVIII: 363, 364.

(New Trial—Appeal—Review) II: 477; VII: 305, 447.

(Estoppel) III: 492.

(Sheriff—Levy) VI: 241.

GUM v. MURRAY ET AL., 6 Montana, 10.

(Instructions — Exceptions — Review) Distinguished VII: 202-205;
XVIII: 363, 364.

(New Trial—Appeal—Review) XII: 259; XXI: 42.

HAASE v. CORBIN, 2 Montana, 409.

(Garnishment) XVIII: 340.

HAGGIN v. LORENZ, 15 Montana, 309.

(Ejectment—Complaint) XV: 432; XVII: 468.

HAGGIN v. SAILE ET AL., 14 Montana, 79.

(Appeal—New Trial) XVII: 358.

HALE v. FORBIS, 3 Montana, 395.

(Consideration) XVII: 297.

HALE v. PARK DITCH CO., 2 Montana, 498.

(Statement on Appeal—Bill of Exceptions) III: 357; VII: 41; IX: 388.

HALL v. ASHBY, 2 Montana, 489.

Affirmed: 119 U. S. 526.

(Dedication of Streets) VIII: 506.

HAMILTON v. GREAT FALLS ST. RY. CO., 17 Montana, 334.

(Negligence—Instructions) XVIII: 408, 409; XIX: 138.

(Pleading) XIX: 551; XXI: 373, 385.

HAMILTON v. WOODWORTH, 17 Montana, 327.

(Waiver) XVII: 368.

HAMMER v. EDWARDS, 3 Montana, 187.

(Pleading) III: 188.

HARMON v. COMSTOCK H. & C. CO., 9 Montana, 243.

(Pleading) XI: 85; Distinguished XIX: 227.

HARMON v. HAWKINS, 18 Montana, 525.

(Sales—Pleading) Distinguished XX: 228.

- HARRIGAN ET AL. v. LYNCH, 21 Montana, 36.
(New Trial—Waiver) XXI: 187.
- HARRIS ET AL. v. LLOYD ET AL., 11 Montana, 390.
(Mining Partners) XVIII: 489.
- HARRIS v. SHONTZ ET AL., 1 Montana, 212.
(Water Right—Diversión) III: 225.
(Pleading) VI: 9; XV: 346.
- HARTLEY v. PRESTON, 2 Montana, 415.
(Practice—Amendment of Pleading) III: 453, 508; VI: 500.
- HARTMAN v. SMITH ET AL., 7 Montana, 19.
(Agreed Statement of Facts—Judgment Roll) XVIII: 257; XXI: 127.
- HARVEY v. WHITLATCH ET AL., 1 Montana, 713.
(Judgment nunc pro tunc) XIV: 206.
- HASTINGS v. MONTANA UNION RY. CO., 18 Montana, 493.
(Fellow Servants) XIX: 139.
- HAUSWIRTH ET AL. v. BUTCHER ET AL., 4 Montana, 299.
(Mining Claims) IV: 317, 535; V: 109, 604; VII: 359; Distinguished
VII: 360.
(Pleading) XIX: 381.
- HAUSWIRTH v. SULLIVAN ET AL., 6 Montana, 203.
(Void Judgment—Remedy) XI: 257.
- HAYES v. DISTRICT COURT, 11 Montana, 225.
(Statement of Facts) XI: 534.
- HEANEY ET AL. v. BUTTE & MONTANA C. CO., 10 Montana, 590.
(Trespass—Injunction) Modified XV: 235.
- HEARDT ET AL. v. McALLISTER, 9 Montana, 405.
(Setting Aside Default) XII: 575, 577; XXI: 164.
- HEDDERICK v. PONTET ET AL., 6 Montana, 345.
(Bond—Signature of Principal) XIII: 366.
- HEDGES v. COUNTY COMMISSIONERS, 4 Montana, 280.
(County Commissioners) IV: 294.
(Fees) Distinguished VI: 3.
(Statutory Construction) XVII: 314; XX: 475.
- HEFFERLIN v. CHAMBERS ET AL., 16 Montana, 349.
(Constitutional Law—County Commissioners) XVII: 243.
- HEILBRONNER v. LLOYD, 17 Montana, 299.
(Instructions) XXI: 587.
- HEINBOCKLE v. ZUGBAUM, 5 Montana, 344.
(Sales) VI: 292; VII: 194; XXI: 284.
- HELENA NATIONAL BANK v. ROCKY MT. TEL. CO., 20 Montana,
379.
(Trial—Question of Law) XXI: 126.
- HELENA STEAM HEATING, ETC., CO. v. WELLS ET AL., 16 Mon-
tana, 65.
(Mechanic's Lien—Attorney's Fees) XVIII: 536.
(Continuing Contract) Distinguished XIX: 458.
- HERBERT v. KING ET AL., 1 Montana, 475.
(Nonsuit—Appeal—Review) II: 463; XIII: 157; XVIII: 255.
(Agency) III: 150; IX: 197.
(Pleading) VI: 72.
- HERBST IMPORTING CO. v. HOGAN, 16 Montana, 384.
(Pleading—Demurrer) XIX: 225.

- HERMAN v. JEFFRIES, 4 Montana, 513.
 (Married Women) VII: 544.
 (Appeal—Exceptions) VIII: 232; IX: 43; XII: 311; XV: 148.
- HERSHFIELD & BRO. v. AIKEN ET AL., 3 Montana, 442.
 (Supreme Court of California) VI: 455.
 (Pleading) VI: 500; XVI: 197; XVII: 342.
- HERSHFIELD ET AL. v. ROCKY MT. BELL TEL. CO., 12 Montana, 102.
 (Use of City Streets) XVI: 6, 7.
- HEYFRON v. MAHONEY, 9 Montana, 497.
 (Elections—Appeal) IX: 588, 589.
 (Amendment) IX: 591; Distinguished XVIII: 198; Distinguished XVIII: 366.
 (Evidence) IX: 604.
- HIBBARD v. TOMLINSON, 2 Montana, 220.
 (Taxing Costs) XIII: 380; XIX: 449; Distinguished XX: 63.
- HIGGINS ET AL. v. GERMAIN, 1 Montana, 230.
 (Pleading) VI: 9; IX: 123.
- HIGLEY v. GILMER ET AL., 3 Montana, 90.
 (Terms of Court) III: 108, 188.
 (Common Carriers of Passengers) V: 272.
 (Negligence—Pleading) XII: 56, 58; XVI: 23; XVII: 388; XIX: 100.
- HIGLEY v. GILMER, 3 Montana, 433.
 Reversed: 110 U. S. 47.
 (Bill of Exceptions) VII: 41.
- HIRBOUR v. REEDING, 3 Montana, 15.
 (Mining Partnership) XVIII: 489.
- HOFFMAN ET AL. v. BEECHER, 12 Montana, 489.
 (Mining Claims) XX: 143, 149.
- HOFFMAN ET AL. v. BOARD OF COUNTY COMMISSIONERS, 18 Montana, 224.
 (County Commissioners) XVIII: 246.
- HOGAN ET AL. v. SHUART, 11 Montana, 498.
 (Appeal—Matters Not Reviewable) XI: 533; XII: 533.
- HOLLAND v. BOARD OF COUNTY COMMISSIONERS, 15 Montana, 460.
 (Mortgages) XXI: 79.
- HOLLAND v. HUSTON, 20 Montana, 84.
 (Expert Witness—Market Value) XXI: 205.
- HONAKER v. MARTIN ET AL., 11 Montana 91.
 (Mining Claims) XVI: 213.
- HOOTMAN v. BRAY, 3 Montana, 409.
 (Pleading) IX: 248.
- HOPE MINING CO. v. BROWN, 7 Montana, 550.
 (Mining Claims) XI: 379.
- HOPKINS v. BUTTE & MONTANA C. CO., 13 Montana, 223.
 (Negligence—Instructions) XVI: 464.
- HOPKINS v. CITY OF BUTTE, 16 Montana, 103.
 (Taxation) XIX: 400.
- HOPKINS ET AL. v. NOYES ET AL., 4 Montana, 550.
 (Mining Claims) IV: 534; IX: 287; XVI: 20; XIX: 498.
- HORSKY v. MORAN, 13 Montana, 250.

- (Appeal—Opinion of Trial Court) XVI: 278.
(Judgment on the Pleadings) XVII: 471.
(Title to Land) XXI: 366.
- HOSKINS v. MCGIRL**, 12 Montana, 246.
(Action—Proper Parties) XII: 566.
- HOSKINS v. WHITE ET AL.**, 13 Montana, 70.
(Bonds—Principal and Sureties) XIII: 365, 366; XIV: 135; XVI: 86;
XVII: 453.
- HOTCHKISS v. MARION ET AL.**, 12 Montana, 218.
(Constitutional Law) Distinguished XVIII: 244; XIX: 64, 65; XX:
437; XXI: 215.
- HOWARD v. QUINN**, 2 Montana, 339.
(Appeal—Review) XIV: 314.
- IDE v. LEISER**, 10 Montana, 5.
(Consideration) XVII: 297.
- INGALLS v. AUSTIN**, 8 Montana, 333.
(Findings—Conflict of Evidence) Distinguished VIII: 346; XVI: 431.
- IN RE BAUM**, 10 Montana, 223.
(Attorneys—Disbarment) XIV: 19.
- IN RE DAVIS—CUMMING'S APPEAL**, 11 Montana, 196.
(Administrators) XI: 217, 218.
- IN RE DAVIS' ESTATE**, 11 Montana, 1.
(Appeal) XI: 291.
- IN RE DEWAR'S ESTATE**, 10 Montana, 422.
(Administrators—Appeals) Distinguished XVIII: 313.
- IN RE DEWAR'S ESTATE**, 10 Montana, 426.
(Appeals) XII: 202.
(Fees and Compensation) Distinguished XIV: 180, 181; XX: 418.
(Local or Special Laws) XIV: 484; XV: 38, 39.
- IN RE FINKELSTEIN**, 13 Montana, 425.
(Statement of Facts) XIV: 4.
(Appealable Order—Alimony) XIV: 397.
- IN RE HALDORN ET AL.**, 10 Montana, 222.
(Contempt—Referee) XIV: 14.
- IN RE HIGGINS' ESTATE**, 15 Montana, 474.
(Jurisdiction) XVIII: 484; XXI: 266.
- IN RE LITER'S ESTATE**, 19 Montana, 474.
(Referred to) XX: 414, 416.
- IN RE McCUTCHEON**, 10 Montana, 115.
(Certiorari) XIII: 349.
(Habeas Corpus) XIV: 385.
- IN RE MCFARLAND'S ESTATE**, 10 Montana, 445.
(Appeals) X: 424; XI: 14, 210; XII: 202; XIV: 257; XV: 505; XVIII:
314.
- IN RE MCFARLAND'S ESTATE**, 10 Montana, 586.
(Probate Law) XV: 503.
- IN RE MacKNIGHT**, 11 Montana, 126.
(Original Writs—Supreme Court) XIII: 28.
(Certiorari) XIII: 349, 427.
(Contempts) Distinguished XVII: 148.

- IN RE RYAN, 20 Montana, 64.
(Constitutional Law) XXI: 215.
- IN RE SHANNON, 11 Montana, 67.
(Contempt) XIII: 349.
- IN RE THOMPSON, 9 Montana, 381.
(Bill of Exceptions) X: 484; XVIII: 13.
(Trial—Verdict) X: 562; XV: 216; XVI: 39.
- ISAACS v. McANDREW ET AL., 1 Montana, 437.
(Interest) II: 220; III: 512; VIII: 185, 318, 319, 321.
- JENSEN v. BARBOUR, 12 Montana, 566.
(Setting Aside Default) XXI: 164.
- JENSEN v. BARBOUR, 15 Montana, 582.
(Nonsuit) XIX: 463.
- JOB v. COUNTY OF MEAGHER, 20 Montana, 424.
(Codes—Interpretation) XXI: 208.
(Constitutional Law) XXI: 215.
- JOHNSON v. BIELENBERG ET AL., 14 Montana, 506.
(Findings) Distinguished XV: 443; XV: 445.
- JOHNSON v. BOSTON & MONTANA CONSOL. C. & S. MIN CO., 16 Montana, 164.
(Negligence—Instructions) XVIII: 408; XIX: 139.
- JOHNSTON v. LEWIS & CLARKE COUNTY, 2 Montana, 159.
(Compensation from County) XX: 467.
- JOSEPHI ET AL. v. MADY CLOTHING CO., 13 Montana, 195.
(Attachment—Amendment) XIV: 228; XVI: 258, 388.
- J. V. FARWELL CO. v. BOYCE ET AL., 17 Montana, 83.
(Replevin) XVII: 87.
- KEENE v. WELSH ET AL., 8 Montana, 305.
(Judgments — Entry — Amendment) IX: 345; XIV: 207.
- KELLEY v. CABLE CO., 7 Montana, 70.
(Instructions) VIII: 445; XVI: 188; XVII: 307; XXI: 587.
(Negligence) XII: 216, 217.
- KELLEY v. CABLE CO., 8 Montana, 440.
(Law of the Case) XVIII: 519.
- KELLEY v. FOURTH OF JULY M. CO., 16 Montana, 484.
(Agency) XVIII: 299.
- KELLEY v. JEFFERIS, 13 Montana, 170.
(Married Women) XV: 264, 265.
- KEMP v. McCORMICK ET AL., 1 Montana, 420.
(Pleading) II: 615; III: 146.
- KENNELLY v. SAVAGE ET AL., 18 Montana, 119.
(Witness—Impeachment) XVIII: 371.
- KENNON v. GILMER ET AL., 4 Montana, 433.
(Jury) V: 95; VI: 230; Distinguished XII: 245.
(Negligence—Pleading—Proof) IX: 109; Distinguished XII: 56, 57;
XVI: 23; XVII: 388.
- KENNON v. GILMER ET AL., 5 Montana, 257.
Reversed: 131 U. S. 22.
(Instructions) VII: 37, 502.
(Change of Venue) VIII: 102, 103; XI: 23; XIII: 167.
(Verdict) IX: 109; XV: 288; XVI: 431; XVII: 351, 353.

- KENNON v. GILMER ET AL.**, 9 Montana, 108.
(Verdict) XVI: 431; XVII: 353.
- KENNON v. KING**, 2 Montana, 437.
(Gambling Game) XIX: 209.
- KILBY v. BAKER**, 9 Montana, 398.
(Appeal—Conflict of Evidence) XI: 274; XVII: 359.
- KING v. AMY & SILVERSMITH CONSOL. MIN. CO.**, 9 Montana, 543.
Reversed: 152 U. S. 222.
(Mines and Mining Claims) XVII: 111-134.
- KING ET AL. v. EDWARDS ET AL.**, 1 Montana, 235.
(Mining Customs—Presumptions) II: 368.
- KING v. NATIONAL M. & E. CO.**, 4 Montana, 1.
(Foreign Corporations) VI: 65; XII: 119.
- KING ET AL. v. SULLIVAN**, 1 Montana, 282.
(Bill of Exceptions) X: 298.
- KING ET AL. v. THOMAS ET AL.**, 6 Montana 409.
(Mining Claims) VII: 107; XIV: 286, 287, 291; XV: 177; XXI: 349.
- KIMPTON v. JUBILEE PLACER MIN. CO. ET AL.**, 16 Montana, 379.
(Jurisdiction) XVII: 143.
- KINNA v. HORN ET AL.**, 1 Montana, 597.
(Irregular Conduct of Counsel) III: 438.
(Appeal—Conflict of Evidence) XI: 274; XVI: 430.
- KINNA ET AL. v. WOOLFOLK**, 4 Montana, 318.
Affirmed: 116 U. S. 599.
- KIRCHER v. CONRAD ET AL.**, 9 Montana, 191.
(Appeal—Conflict of Evidence) IX: 399; XVII: 359.
- KLEIN ET AL. v. DAVIS ET AL.**, 11 Montana, 155.
(Injunction—Discretion) XI: 159, 160; XVI: 64; XVII: 521.
- KLEINSCHMIDT v. BINZEL**, 14 Montana, 31.
(Res Adjudicata) XVIII: 42.
(Judgment on Demurrer) XVIII: 400.
- KLEINSCHMIDT ET AL. v. DUNPHY**, 1 Montana, 118.
Reversed: 11 Wall. (U. S.) 610; Reconsidered: 18 Wall. (U. S.) 648.
(Jury Common-law Actions) I: 200.
(Jury—Equity Cases) I: 648, 649; II: 387, 388; III: 226.
(Verdict—Conflict of Evidence—Review) XVI: 430.
- KLEINSCHMIDT ET AL. v. GREISER ET AL.**, 14 Montana, 484.
(Jury—Equity Cases) XXI: 287.
- KLEINSCHMIDT v. ILER**, 6 Montana, 122.
(Evidence—Appeal—Review) XVIII: 252, 255.
- KLEINSCHMIDT v. KLEINSCHMIDT**, 9 Montana, 477.
(Bond to Reconvey) Distinguished, and in part Disapproved, XI: 60, 61.
- KLEINSCHMIDT ET AL. v. McANDREWS ET AL.**, 4 Montana, 8, 223.
Reversed: 117 U. S. 282.
(Appeal—Review) IV: 223-226, 232, 233; VI: 501; VII: 483; VIII: 223, 224; Distinguished XIII: 20, 21; XVIII: 254.
- KLEINSCHMIDT v. McDERMOTT**, 12 Montana, 309.
(Review of Instructions) XIII: 397; XV: 145; XIX: 238.
- KLEINSCHMIDT v. STÖELE**, 15 Montana, 181.
(Equity—Pleading—Prayer for Relief) XVIII: 547.
- KLINE v. HANKE ET AL.**, 14 Montana, 361.

- (Landlord and Tenant) XXI: 520.
KNOX v. GERHAUSER, 3 Montana, 287.
 (Verdict—Conflict of Evidence—Review) XI: 274; XVI: 430.
KRUEGER v. SPEITH, 8 Montana, 482.
 (Partnership) VIII: 493, 494, 498; XIV: 82; XVIII: 49.
- LAMBRECHT v. PATTEN ET AL.**, 15 Montana, 260.
 (Appeal—Verdict—Review) XV: 281.
 (Husband and Wife) XVI: 28, 32, 305; XIX: 175.
- LAMME v. DODSON ET AL.**, 4 Montana, 560.
 (Pleading) IX: 223.
 (Real Estate) XI: 120; XII: 10; XVIII: 445.
- LANDSMAN v. THOMPSON**, 9 Montana, 182.
 (Appeal—Conflict of Evidence) IX: 399; XI: 273, 274; XVI: 254, 257;
 XVII: 359, 556.
- LANE v. COMMISSIONERS OF MISSOULA COUNTY**, 6 Montana, 473.
 (Sheriff—Fees) VI: 483.
 (Statutory Construction) VI: 562; XVII: 75, 314.
- LANG ET AL. v. CALDWELL ET AL.**, 13 Montana, 458.
 (Attorney's Fee) XIV: 515.
- LANGFORD v. KING**, 1 Montana, 33.
 (Territory of Montana) II: 427, 598; IX: 397.
- LANGSTAFF v. MILES**, 5 Montana, 554.
 (Attachment) VI: 239; XIII: 200; XVI: 388.
 (Statutory Construction) XX: 552.
- LARGEY v. CHAPMAN ET AL.**, 18 Montana, 563.
 (Attachment) XVIII: 587.
 (Statutory Construction) XX: 152.
- LARGEY v. SEDMAN**, 3 Montana, 357.
 (?) XV: 313.
- LARGEY v. SEDMAN**, 3 Montana, 472.
 (Appeal—Review of Evidence) IV: 78; IX: 588; XVIII: 252.
 (Description of Property) XV: 313. (?)
- LAUBENHEIMER v. BACH, CORY & CO. ET AL.**, 19 Montana, 177.
 (Conversion) XIX: 234.
- LAUBENHEIMER v. McDERMOTT**, 5 Montana, 512.
 (Claim and Delivery—Pleading) XV: 346.
- LAVELLE ET AL. v. LOWRY**, 5 Montana, 498.
 (Claim and Delivery—Verdict) XVI: 90.
- LEBCHER v. BOARD OF COMMISSIONERS**, 9 Montana, 315.
 (Counties—Contracts) XI: 493; XVIII: 239.
 (Counterclaim) XIV: 361.
 (New Trial) XVII: 557.
- LEDLIE v. WALLEN**, 17 Montana, 150.
 (Pleading) XVIII: 51.
- LEGGAT v. LEGGAT**, 13 Montana, 190.
 (Equity—Jury) XVI: 204; XXI: 287.
- LEGGATT v. PRIDEAUX**, 16 Montana, 205.
 (Illegal Acts—Intent) XX: 491.
- LEONARD v. SHATZER**, 11 Montana, 422.
 (Findings) XI: 450.
- LEOPOLD ET AL. v. SILVERMAN ET AL.**, 7 Montana, 266.

- (Chattel Mortgages) VII: 311, 329; IX: 275, 541; X: 78; Distinguished X: 385, 386; Distinguished XI: 459-467; XVIII: 580; XX: 72; Disapproved XX: 74.
(Equity) IX: 542; XVI: 447.
- LEYSON v. DAVIS ET AL., 17 Montana, 220.
Dismissed 170 U. S. 36.
(New Trial) XX: 336.
(Agreement to Devise) XXI: 275.
- LINCOLN ET AL. v. RODGERS ET AL., 1 Montana, 217.
(Verdict—Evidence—New Trial) VI: 245, 286, 501; X: 506; XI: 274; XVI: 430.
(Mining Claims—Tailings) XX: 187.
- LINDLEY v. DAVIS ET AL., 6 Montana, 453.
(Homestead) Reversed: VII: 211; VII: 218.
(Statutory Construction) XVI: 57; XX: 552.
- LINDLEY v. DAVIS ET AL., 7 Montana, 206.
(Homestead) IX: 125; XIII: 277, 495, 497.
- LITTRELL ET AL. v. WILCOX, 11 Montana, 77.
(Disqualification of Judge) XI: 224.
- LLOYD v. BOARD OF COMMISSIONERS, 15 Montana, 433.
(Action) XV: 518, 521, 522.
(Compensation from County) Distinguished XX: 467.
- LLOYD v. SILVER BOW COUNTY., 11 Montana, 408.
(Constitutional Law) XVII: 81.
- LLOYD v. SULLIVAN, 9 Montana, 577.
(Appeal—Evidence—Review) XVIII: 252.
- LOCKEY v. HORSKY, 4 Montana, 457.
(Appeal—Evidence—Review) XV: 316; XVIII: 252, 255.
- LOEB ET AL. v. KAMAK ET AL., 1 Montana, 152.
(Pleading) VII: 201.
- LOEB v. SCHMITH, 1 Montana, 87.
(Setting Aside Default) XXI: 164.
- LOMME v. KINTZING ET AL., 1 Montana, 290.
(Judgment on the Pleadings) II: 42, 46.
- LOMME v. SWEENEY ET AL., 1 Montana, 584.
Affirmed: 22 Wall. (U. S.) 208.
(Undertaking) II: 462; III: 238; VI: 344, 350; XVI: 86.
- LOWELL ET AL. v. AMES ET AL., 6 Montana, 187.
(Setting Aside Judgment) Distinguished VII: 382; IX: 408; Distinguished XII: 575.
- LUNDEEN v. LIVINGSTON ELECTRIC LIGHT CO., 17 Montana, 32.
(Negligence) XVIII: 406.
- LYNCH v. BECHTEL, 19 Montana 548.
(Pleading) XXI: 373.
- MADDOX v. RADER ET AL., 9 Montana, 126.
Reversed: 150 U. S. 128.
(Interest) XVI: 334.
(Law of the Case) XVIII: 513, 519, 594.
- MADDOX v. TEAGUE ET AL., 18 Montana, 512.
(Law of the Case) XVIII: 594.

- MAGEE v. FOGERTY**, 6 Montana, 237.
(Attachment) VII: 365; XIII: 200; XVI: 258, 388.
- MALOY v. BERKIN**, 11 Montana, 138.
(Equity) XIV: 420, 421.
(Mines—Market Value) XXI: 338.
- MANTLE v. LARGEY**, 17 Montana, 479.
(Setting Aside Default) XXI: 164.
- MANTLE ET AL. v. NOYES**, 5 Montana, 274.
Affirmed: 127 U. S. 348.
(Mining Claims—Patent) Distinguished VI: 169; XXI: 349, 350.
(Equity—Jury) XXI: 287.
- MANTON v. TYLER**, 4 Montana, 364.
(Statutory Construction) XVII: 314.
- MARCUM ET AL. v. COLEMAN ET AL.**, 8 Montana, 196.
(Justification of Levy) X: 394.
- MARCUM ET AL. v. COLEMAN ET AL.**, 10 Montana, 73.
(Chattel Mortgages) XVIII: 583.
- MARDEN v. WHEELOCK ET AL.**, 1 Montana, 49.
(Issues of Law—Waiver) II: 230.
(Appeal—Review—Intermediate Order) II: 548.
- MARSH v. KINNA**, 2 Montana, 547.
(Appeal—Review) XIV: 314.
- MARSHALL v. LIVINGSTON NAT'L BANK**, 11 Montana, 351.
(Wage Workers' Law) XVI: 557.
(Assignment for the Benefit of Creditors) XIX: 17.
- MARTIN v. DE LOGE**, 15 Montana, 343.
(Rules of Court) XXI: 186.
- MASON ET AL. v. GERMAINE ET AL.**, 1 Montana, 263.
Affirmed: 18 Wall. (U. S.) 659.
(Mechanic's Lien) I: 345; XII: 349; XVIII: 535.
(Appeal—Assignment of Errors) II: 477.
(Appeal—Intermediate Order) II: 548.
- MATTINGLY ET AL. v. LEWISOHN**, 8 Montana, 259.
(Mining Claims) XIII: 516, 517; Distinguished XIX: 499.
- MATTOCK v. GOUGHNOUR**, 11 Montana, 265.
(New Trial) XII: 343; XIII: 300, 302; XV: 281.
- MATTOCK v. GOUGHNOUR**, 13 Montana, 300.
(New Trial) XIII: 518.
- MAULDIN ET AL. v. BALL**, 5 Montana, 96.
(Pleading) X: 480; XIX: 358, 493.
- MAXEY v. SPEITH**, 8 Montana, 494.
(Attachment) XIV: 82, 86, 87.
- MAYER ET AL. v. CAROTHERS ET AL.**, 14 Montana, 274.
Dismissed 164 U. S. 325.
(Ejectment—Statute of Limitations) XV: 177.
(Nonsuit) XV: 179, 586; XIX: 453.
- MAYGER v. CRUSE ET AL.**, 5 Montana, 485.
(Contracts) VIII: 240; X: 15.
- McADOW v. BLACK ET AL.**, 4 Montana, 475.
(Conveyances—Acknowledgment—Recording) Distinguished VI: 605.
XV: 579.
(Judgment Lien) X: 199.

- McANDREWS v. MONTANA UNION RY. CO., 15 Montana, 290.
(Master and Servant—Negligence) Distinguished XVI; 501.
- McBURNEY v. BERRY, 5 Montana, 300.
(Mining Claims—Declaratory Statement) VIII: 259.
- McCAULEY v. GILMER, 2 Montana, 202.
(Pleading) V: 103; VI: 72; VIII: 204; IX: 328; XIX: 492.
- McCAULEY v. McKEIG, 8 Montana, 389.
(Water Right—Abandonment) XV: 576; XVIII: 219, 438.
- McCAULEY v. TYLER ET AL., 11 Montana, 51.
(Appeal—Evidence—Review) XVII: 358.
- McCORMICK v. HUBBELL ET AL., 4 Montana, 87.
(Res Adjudicata) XVI: 87.
- McCOWAN v. MACLAY, 16 Montana, 234.
(Mining Claims—Location Notice) XVI: 267.
- McDONALD v. LANNEN ET AL., 19 Montana, 78.
(Water Right—Verbal Transfer) XX: 277.
- McFARLAND v. CUTTER ET AL., 1 Montana, 383.
(Exceptions) VI: 501.
(Pleading) XIX: 376.
- MCGREGOR v. WELLS, FARGO & CO., 1 Montana, 142.
Appeal dismissed: 13 Wall. (U. S.) 188.
(Set-off) II: 233.
(Parties) XXI: 578.
- McINTOSH ET AL. v. HURST, 6 Montana, 287.
(Parties—Attachment Undertaking) XIII: 72.
- McKAY v. McDOUGAL, 19 Montana, 488.
(Mining Claims—Pleading) XXI: 12.
- McKAY v. MONTANA UNION RY. CO., 13 Montana, 15.
(Nonsuit) XIII: 157, 291, 402; XIV: 288, 336; XV: 179, 586; XVIII: 254, 255, 257; XIX, 453; XXI: 126.
(Bill of Exceptions) XV: 556; XIX: 50.
- McKINNEY v. POWERS, 2 Montana, 466.
(Instructions—Exceptions) IV: 398, 524; VI: 501; XII: 311.
- McKINSTRY v. CLARK & CAMERON, 4 Montana, 370.
(Instructions—Exceptions) IV: 524; VI: 12, 501; Distinguished VII: 202-205; Distinguished XVIII: 363.
(Mining Claims) IV: 535; VI: 64.
(Evidence) Modified XIV: 272-274.
(Pleading) XIX: 496.
- McNAUGHTON C. v. McGIRL, 20 Montana, 124.
(Interstate Commerce) Distinguished XX: 207, 208.
- MEADOWCRAFT ET AL. v. WALSH, 15 Montana, 544.
(Assignments) XVI: 270; XVII: 478; XVIII 378.
- MEAGHER v. HARDENBROOK ET AL., 11 Montana, 385.
(Water Right—Change of Use) XV: 131.
(Water Right—Tenants in Common) XXI: 370.
- MERCHANTS & MINERS NAT'L BANK v. BARNES, 18 Montana, 335.
(Garnishment) XIX: 109.
(Assignment of Bank Deposits) XX: 196.
- MERCHANTS NAT'L BANK v. GREENHOOD ET AL., 16 Montana, 395.
(Verdict — Evidence — Error — Review) XVIII: 42, 47.

- (Attachment) XXI: 389, 404-406.
 (Supreme Court—Rehearing) XXI: 571.
- MERRIGAN v. ENGLISH ET AL.**, 9 Montana, 113.
 (Mechanic's Lien) XII: 345, 528; XIII: 275, 277, 279, 288; XVI: 190, 191, 193; XVII: 89; XVIII: 535.
- METCALF ET AL. v. PRESCOTT ET AL.**, 10 Montana, 283.
 (Mining Claims) XI: 197; XIII: 519; XIV: 287; Distinguished XV: 251; XV: 416; XVI: 236.
- MIDDLE CREEK DITCH CO. v. HENRY ET AL.**, 15 Montana, 558.
 (Water Right—Appeal—New Trial) XVI: 383.
 (Recording) XVIII: 350, 450.
 (Water Right—Abandonment) XVIII: 438; XIX: 84, 86; XX: 279.
- MILBURN MANUFACTURING CO. v. JOHNSON ET AL.**, 9 Montana, 537.
 (Chattel Mortgages) XVIII: 583.
 (Statutory Lien—Equity) XXI: 392.
- MILES v. COUTTS ET AL.**, 20 Montana, 47.
 (Mechanic's Lien) Distinguished XXI: 196.
- MILES v. EDSALL**, 7 Montana, 185.
 (Verdict) XVI: 89.
 (Sales) XXI: 284.
- MILES v. EDWARDS ET AL.**, 6 Montana, 180.
 (Injunction—Attorney's Fees) Distinguished XIII: 158, 159.
- MILLIGAN ET AL. v. SAVERY**, 6 Montana, 129.
 (Pleading) XII: 498; XIX: 230; Distinguished XIX: 500.
- MING v. TRUETT**, 1 Montana, 322.
 (Probate Judge) II: 55, 492; Overruled IX: 214-217.
 (Verdict—Evidence—Review) II: 415; VI: 166, 226, 245, 286, 501; X: 506; XI: 274; XVI: 430.
 (Implied Findings) III: 192, 229.
- MING v. WOOLFOLK**, 3 Montana, 380.
 (Construction) III: 492.
- MISSOULA COUNTY v. EDWARDS.**, 3 Montana, 60.
 (Bond of County Treasurer) IV: 135-139.
- MISSOULA ELECTRIC LIGHT CO. v. MORGAN**, 13 Montana, 394.
 (Justice of the Peace—Appeal) XIII: 399.
 (Instructions—Appeal) XIX: 238.
- MOCHON v. SULLIVAN ET AL.**, 1 Montana, 470.
 (Mechanic's Lien) I: 474, 485.
- MONTANA CATHOLIC MISSIONS v. LEWIS & CLARKE COUNTY**, 13 Montana, 559.
 (Taxation—Exemption) XXI: 592.
- MONTANA COPPER CO. v. DAHL**, 6 Montana, 131.
 Affirmed: 132 U. S. 264.
- MONTANA IMPROVEMENT CO. v. COTTER ET AL.**, 7 Montana, 541.
 (Married Women) XV: 450.
- MONTANA L. & M. CO. v. OBELISK M. & C. CO. ET AL.**, 15 Montana, 20.
 (Mechanic's Lien) XVI: 118; XIX: 40, 41.
- MONTANA MILLING CO. v. JEFFRIES**, 14 Montana, 143.
 (Agreed Statement of Facts) XVI: 560.

- MONTANA MINING CO. v. ST. LOUIS M. & M. CO. ET AL., 19 Montana, 313.
Affirmed 171 U. S. 650.
- MONTANA NAT'L BANK v. MERCHANTS NAT'L BANK ET AL., 19 Montana, 586.
(Garnishment) XXI: 390, 438.
(Equity) XXI: 404.
- MONTANA NAT'L BANK v. SCHMIDT, 6 Montana, 609.
(Mortgages—Acknowledgment by Wife) XIX: 326.
- MONTANA RY. CO. v. WARREN ET AL., 6 Montana, 275.
Affirmed: 137 U. S. 348.
(Appeal—Transcript) VII: 306, 447; XIII: 124; XVI: 116.
(Market Value) XI: 150; XV: 454-457; XXI: 338.
(Appeal—Evidence—Review) XVI: 430.
- MOORE v. NORTHERN PAC. RY. CO., 18 Montana, 290.
(Railroad Grant) XVIII: 292, 293.
- MORGAN ET AL. v. REYNOLDS, 1 Montana, 163.
(Replevin) II: 465.
- MORRIS v. BURKE, 15 Montana, 214.
(Control of Jury over Verdict) XVI: 39.
- MORSE v. BOYDE, 11 Montana, 248.
(Record on Appeal) XXI: 42.
(NOTE.—This is a miscitation for Arnold v. Sinclair, 12 Montana, 248.)
- MORSE v. SWAN, 2 Montana, 306.
(Findings—Presumption) III: 192, 229; XV: 316.
- MOXON v. WILKINSON, 2 Montana, 421.
(Mining Claims) VII: 453; VIII: 304; IX: 81; XXI: 69.
(Recording) XV: 576; XVIII: 249.
- MULLER v. BUYCK, 12 Montana, 354.
(Appeal—Review—Opinion of Trial Court) XIII: 265; XVI: 278.
(Trusts) XIV: 179.
(Equity—Cancellation of Deed) XIV: 467.
- MURPHY v. PHELPS, 12 Montana, 531.
(Pleading) XVI: 197; XVII: 342.
- MURRAY v. COULON ET AL., 19 Montana, 339.
(Partition—Attorney's Fees) XIX: 393; XX: 47.
- MURRAY v. HEINZE, 17 Montana, 353.
(Statutory Construction) XVIII: 567; XX: 552.
(Instructions—Duty of Jury) XIX: 52; XXI: 603.
- MURRAY v. LARABIE, 8 Montana, 208.
(Notice of Motion) IX: 520.
(Depositions) X: 294, 295.
- MURRAY ET AL. v. SWANSON ET AL., 18 Montana, 533.
(Mechanic's Lien) XIX: 40.
- MUTUAL BENEFIT LIFE INS. CO. v. WINNE ET AL., 20 Montana, 20.
(Foreign Corporations) XX: 42.
- MYENDORF ET AL. v. FROHNER ET AL., 3 Montana, 232.
(Pleading) VIII: 241; XIX: 494.
(Estoppel) XI: 348.
- NATIONAL MINING CO. v. POWERS, 3 Montana, 344.
(Real Estate—Adverse Possession) IV: 591; XI: 120; XVIII: 445.

- NELSON v. CITY OF HELENA, 16 Montana, 21.
(Contributory Negligence) XVII: 388; XIX: 100.
- NELSON v. DONOVAN ET AL., 14 Montana, 78.
(Former Appeal) XVI: 85.
- NELSON v. DONOVAN, 16 Montana, 85.
(Sureties) XVII: 453.
- NELSON v. O'NEAL, 1 Montana, 284.
(Injunction) IX: 475; XI: 159; XVII: 521.
(Mining Claims—Tailings) XX: 188.
- NEWELL ET AL. v. MYENDORF, 9 Montana, 254.
(Appeal) X: 60, 89; Distinguished X: 132; XVI: 116.
(Estoppel) X: 460; XIII: 34; XVII: 394, 501, 585; XIX: 341.
- NEWELL v. NICHOLSON 17 Montana, 389.
(Estoppel) XVII: 501; XIX: 341.
(Contracts—Nonsuit) XVII: 508.
(Evidence) XXI: 480.
- NEWELL ET AL. v. WHITWELL ET AL., 16 Montana, 243.
(Attachment) XVI: 265; XVIII: 473; XXI: 180, 182.
(Evidence) XVII: 551.
(Contract of Sale) Distinguished XX: 354.
- NEY v. ORR, 2 Montana, 559.
(Bond—Sureties) XIII: 366.
- NICHOLS v. DOBBINS, 2 Montana, 540.
(Waiver) V: 232.
- NOLAN v. LOVELOCK ET AL., 1 Montana, 224.
(Mechanic's Lien) XII: 349, 528.
(Mining Partnerships) XVII: 523; XVIII: 489.
- NORTHERN PACIFIC R. R. CO. v. BENDER, 13 Montana, 432.
(Executions) XIX: 46.
- NORTHERN PACIFIC R. R. CO. v. CARLAND, 5 Montana, 146.
(Taxation) VI: 122; X: 104, 106; XII: 44.
(Equity) X: 106.
- NORTHERN PACIFIC & M. RY. CO. v. FORBIS ET AL., 15 Montana, 452.
(Mines—Market Value) XXI: 338.
- NORTHERN PACIFIC R. R. CO. v. LILLY, 6 Montana, 65.
(Land Grant) VI: 364; VII: 406.
- NORTHERN PACIFIC R. R. CO. v. MAJORS, 5 Montana, 111.
(Pleading) VI: 67.
(Land Grant) VI: 362; Disapproved VI: 372; VII: 67, 406.
- NORTHERN PACIFIC R. R. CO. v. PATTERSON, 10 Montana, 90.
(Taxation) XII: 37, 40, 44; XIV: 318; XV: 308.
- NOTEWARE ET AL. v. STERNS, 1 Montana, 311.
(Appeal) VII: 483; VIII: 223; XI: 292.
- NOYES ET AL. v. BLACK ET AL., 4 Montana, 527.
(Mining Claims) XIX: 497.
- O'DONNELL v. GLENN ET AL., 8 Montana, 248.
(Mining Claims) VIII: 303, 377; IX: 480; X: 292, 293; XV: 251, 416;
XVI: 236.
- O'DONNELL v. GLENN, 9 Montana, 452.
(Mining Claims) XVI: 236.

- O'KEEFE v. DYER ET AL., 20 Montana 477.
(Mines—Market Value) XXI: 338.
- ORMUND v. GRANITE MOUNTAIN MINING CO., 11 Montana, 303.
(Mining Claims) Distinguished XVII: 356; XVII: 357.
- ORR v. HARDING ET AL., 1 Montana, 387.
(Verbal Understanding of Attorneys) II: 502; VI: 189.
- ORR v. HASKELL, 2 Montana, 225.
(Instructions—Exceptions) VI: 501.
(Appeal—Evidence—Review) XI: 274; XVI: 430.
(Appeal—Pleading—Review) XI: 533; XII: 533.
- ORR v. HASKELL, 2 Montana, 350.
(Appealable Order) VII: 347, 348; Distinguished XV: 100, 175; XIX: 447.
- OWEN v. McCORMICK, 5 Montana, 255.
(Appeal) VI: 31.
- PALMER v. ISRAEL ET AL., 13 Montana, 209.
(Injunction) XV: 235; XX: 449.
- PALMER v. McMASTERS, 8 Montana, 186.
(Validity of Judgment) X: 394.
(Summons—Service by Publication) XIII: 188, 190; Distinguished XVII: 497; XVII: 499, 500.
(Statutes—Construction) XXI: 557.
- PALMER v. McMASTERS, 13 Montana, 184.
(Summons—Service by Publication) XVII: 499; Distinguished XVII: 497.
- PALMER v. MURRAY, 6 Montana, 125.
(Married Women) VIII: 180, 181.
- PALMER v. MURRAY, 8 Montana, 174.
(Interest—Costs) Modified VIII: 313, 319.
(Law of the Case) XVIII: 519.
- PALMER v. MURRAY, 8 Montana, 312.
(Judgment Modified) XI: 451.
- PARBERRY v. WOODSON SHEEP CO. ET AL., 18 Montana, 317.
(Waiver of Security) Distinguished XVIII: 567.
- PARCHEN ET AL. v. ASHBY, 5 Montana, 68.
Affirmed: 119 U. S. 526.
- PARCHEN v. PECK, 2 Montana, 567.
(Pleading—Waiver) III: 211; XVI: 198, 558.
(Instructions) VIII: 108.
(Evidence) VIII: 430.
- PARDEE v. MURRAY ET AL., 4 Montana, 35.
(Appeal) VII: 433.
- PARDEE v. MURRAY ET AL., 4 Montana, 234.
Dismissed: 127 U. S. 787.
- PARKER v. BOND ET AL., 5 Montana, 1.
(Pleading—Appeal) VII: 233.
(Injunction) Distinguished XIII: 159.
- PARKS v. BARKLEY, 1 Montana, 514.
(Forcible Entry) VIII: 368; XI: 87.
- PARKS—PETITION FOR HABEAS CORPUS, 3 Montana, 426.
(Title to Office—Collateral Attack) V: 592.

- PARROTT v. HUNGELBURGER, 9 Montana, 526.
(Former Appeal) XIV: 26, 27, 28, 30, 206.
- PARROTT v. KANE ET AL., 14 Montana, 23.
(Statement of the Case) XIV: 206.
- PARROTT v. SCOTT ET AL., 6 Montana, 340.
(Replevin) VI: 351.
- PAYNE v. DAVIS, 2 Montana, 381.
(Appeal—Jurisdiction) IX: 586.
(Waiver) XXI: 42.
- PELTON v. MINAH CONSOL. MINING CO., 11 Montana, 281.
(Mechanic's Lien—Lessee) XII: 549; XV: 23; Distinguished XV: 24.
- PENDLETON v. COWLING ET AL., 11 Montana, 38.
(Liability of Grantee) XIII: 463; XV: 519-521.
- PEOPLE (EX REL.) v. VAN GASKIN ET AL., 5 Montana, 352.
(Legislative Power Over Public Officers) VII: 428; XI: 412.
- PERKINS v. DAVIS, 2 Montana, 474.
(Pleading) III: 144; VI: 244; VII: 111; VIII: 220.
- PETERS v. VAWTER ET AL., 10 Montana, 201.
(Statutory Construction) X: 439.
(Execution) XXI: 575.
(Judgment—Revivor by Motion) XXI: 575.
- PHILLIPS v. PHILLIPS, 18 Montana, 305.
(Executors) XVIII: 315.
- PIERSE v. MILES, 5 Montana, 549.
(Attachment—Undertaking) V: 554; VI: 288, 348; VII: 562; XII: 457;
XIII: 72, 200, 366; XVI: 258, 388.
- PIGOTT v. BOARD OF CANVASSERS OF CASCADE COUNTY, 12 Montana, 537.
(Duties of Canvassing Board) XIII: 30, 54.
- PINCUS v. DOWD, 11 Montana, 88.
(Default) XII: 575; XIII: 222.
- PINNEY v. HERSHFIELD ET AL., 1 Montana, 307.
(New Trial—Specification of Errors) II: 477.
(Bond—Sureties—Pleading) XIII: 72; XVI: 86; Disapproved XIX: 322.
- PLAISTED v. NOWLAN, 2 Montana, 359.
(Appeals) III: 475; Distinguished XI: 14; Distinguished XI: 290.
- PLATNER v. COMMISSIONERS OF MADISON COUNTY 5 Montana, 458
(Sheriffs) Distinguished XV: 436.
- PORTER v. CLARK ET AL., 6 Montana, 246.
(Appeal—Sufficiency of Evidence) VII: 106; XV: 316; XVIII: 252.
- POWER ET AL. v. GUM, 6 Montana, 5.
(Pleading) VII: 579; IX: 123; XV: 346; XVIII: 241.
(Judgment on the Pleadings) VIII: 222; XVII: 472.
- PRICE v. LUSH, 10 Montana, 61.
(Elections—Ballot Law) XIII: 330; Modified XVI: 48, 49, 52, 56, 57;
Distinguished XVI: 58; Considered Reversed XVI: 62; Criticised
XIX: 289.
- PRINCETON MINING CO. v. FIRST NAT'L BANK ET AL., 7 Montana, 530.
(Appeal—Presumptions as to Findings) IX: 589; XV: 316.
(Attachment) X: 471.

- PROCTOR v. CASCADE COUNTY, 20 Montana, 315.
(Statutes—Repeal) XX: 436; XXI: 233.
- PROSSER v. MONTANA CENTRAL RY. CO., 17 Montana, 372.
(Contributory Negligence) XVII: 432.
- QUIGLEY v. BIRDSEYE ET AL., 11 Montana, 439.
(Appeal—Costs) XIII: 464.
(Water Rights) XV: 572; XIX: 84.
- QUIRK v. CLARK ET AL., 7 Montana, 231.
(Pleading) XII: 533.
- RADER v. ERVIN ET AL., 1 Montana, 632.
(Mortgage—Decree of Foreclosure) II: 337.
- RADER v. NOTTINGHAM, 2 Montana, 157.
(Appeal—Order Taxing Costs) II: 222, 351, 353; III: 142; Distinguished VII: 347, 348; XIII: 380; Distinguished XV: 100; XIX: 447, 449.
- RAMSEY v. CORTLAND CATTLE CO., 6 Montana, 498.
(Appeal—Verdict—Evidence) X: 506; XVI: 430.
(Instructions—Exceptions) XII: 311.
(Appeal for Delay—Penalty) XVI: 334.
- RANDALL ET AL. v. AMERICAN FIRE INS. CO., 10 Montana, 340.
(Insurance Policy) X: 364-369; XII: 468.
- RANDALL v. GREENHOOD ET AL., 3 Montana, 506.
Affirmed: 111 U. S. 775.
(Pleading—Amendment) VI: 500.
(Instructions—Exceptions) VII: 40.
(Interest) VIII: 185, 318, 319, 321.
- RANDALL ET AL. v. PHOENIX INS. CO., 10 Montana, 362.
(Insurance Policy) X: 367-369.
- RANKIN v. CAMPBELL ET AL., 1 Montana, 300.
(Former Appeal) II: 367.
- RAUNHEIM v. DAHL, 6 Montana, 167.
Affirmed: 132 U. S. 260.
(Mining Claims) VI: 132.
- RAYMOND v. THEXTON ET AL., 7 Montana, 299.
(New Trial—Appeal—Transcript) VII: 319; IX: 63, 64, 67, 264; X: 88, 298; XI: 439; XIII: 124; XV: 146; XVI: 116; XIX: 138.
(Pleading) XVI: 310.
- RAYMOND v. THEXTON ET AL., 7 Montana, 313.
(New Trial—Appeal—Transcript) VII: 447, 483, 484.
- RAYMOND v. WIMSETTE, 12 Montana, 551.
(Appeal—Pleading) XII: 599.
- RED MOUNTAIN CONSOL. MINING CO. v. ESLER, 18 Montana, 174.
(Injunction) XXI: 45.
- REECE v. ROUSH, 2 Montana, 586.
(Equitable Defense) IV: 590.
- REED ET AL. v. POINDEXTER ET AL., 16 Montana, 294.
(Pleading) XVII: 394, 501.
- REMINGTON ET AL. v. BAUDIT, 6 Montana, 138.
(Mining Claims) XI: 96.
- RENSHAW v. SWITZER, 6 Montana, 464.

- (Mining Claims—Pleading) IX: 287; XII: 498; XIX: 498.
ROBERTSON ET AL. v. SMITH ET AL., 1 Montana, 410.
 (Mining Claims) III: 79; IV: 538, 557.
ROCHELEAU v. BOYLE ET AL., 11 Montana, 451.
 (Chattel Mortgages—Fraud) XI: 483; XII: 483; XVII: 306, 307.
RODONI v. LYTLE, 18 Montana, 123.
 (Record on Appeal) XVI: 116.
ROONEY v. TONG ET AL., 4 Montana, 597.
 (Nonsuit—Bill of Exceptions) VIII: 223.
ROOT v. DAVIS, 10 Montana, 228.
 (Administrator) XI: 206.
ROSENSTEIN v. COLEMAN ET AL., 18 Montana, 459.
 (Assignment for the Benefit of Creditors) XIX: 422.
ROSSITER v. LOEBER, 18 Montana, 372.
 (Pleading) XIX: 416.
ROUSH v. FORT, 2 Montana, 482.
 (Former Appeal) III: 181-186.
ROUSH v. FORT, 3 Montana, 175.
 Modified: 104 U. S. 142.
RUFF v. RADER, 2 Montana, 211.
 (Practice) XVIII: 409.
RUSSELL v. CHUMASERO ET AL., 4 Montana, 309.
 (Mining Claims) VII: 454; VIII: 246, 377, 379; X: 292, 295; XI: 184.
RUSSELL v. HOYT ET AL., 4 Montana, 412.
 Reversed: 117 U. S. 401.
 (Mining Claims) IV: 535.
 (Judicial Notice) VI: 390.
 (Pleading) XI: 533.
RUTHERFORD v. TALENT, 6 Montana, 112.
 (New Trial—Appeal) XII: 259.
RYAN v. DUNPHY, 4 Montana, 342.
 Affirmed: 116 U. S. 491.
 (Contracts) V: 497; VIII: 240; X: 15.
RYAN v. GILMER, 2 Montana, 517.
 (Common Carriers) V: 271.
RYAN v. KINNEY, 2 Montana, 454.
 (Probate Judge—Collateral Proceedings) Distinguished XIV: 253, 254, 258.
RYAN ET AL. v. MAXEY ET AL., 14 Montana, 81.
 (Attachment) XIV: 86.
 (Former Appeal) XV: 100; XVII: 165.
 (Supplemental Proceedings—Creditor's Bill) XXI: 407, 410.
RYAN ET AL. v. MAXEY ET AL., 15 Montana, 100.
 (Appealable Order) XVII: 165; XIX: 447.
RYAN ET AL. v. MAXEY ET AL., 17 Montana, 164.
 (Costs—Briefs) XVIII: 410.
RYAN v. SPEITH ET AL., 18 Montana, 45.
 (Creditor's Bill) XX: 364.
 (Creditor's Suit—Equity) XXI: 404.
SANDERS v. FARWELL, 1 Montana, 599.
 Appeal — Findings — Evidence) VI: 245.

- SANDS v. MACLAY, 2 Montana, 35.
Reversed: 94 U. S. 586.
(Pleading) II: 204, 271; XVIII: 204.
- SANFORD v. GATES ET AL., 18 Montana, 398.
(Contracts) XXI: 285.
- SANFORD v. GATES, TOWNSEND & CO. ET AL., 21 Montana, 277.
(Written Contract—Oral Evidence) XXI: 518.
- SANKEY v. ST. MARY'S ACADEMY, 8 Montana, 265.
(Trespass—Injunction) XV: 234, 235.
- SAVILLE v. AETNA INS CO., 8 Montana, 419.
(Fire Insurance) VIII: 431.
- SAWYER v. ROBERTSON, 11 Montana, 416.
(Summons) Distinguished XII: 153-155; XII: 160, 162; XIX: 60; XX: 557.
- SCHERRER v. HALE, 9 Montana, 63.
(New Trial—Appeal) IX: 66, 67, 149.
- SCHNEPEL v. MELLEN, 3 Montana, 118.
(Townsite—Probate Judge) III: 86; Distinguished IX: 216-218.
- SCHULTZ v. O'ROURKE, 18 Montana, 418.
(Waiver) XX: 486.
- SCHUTTLER ET AL. v. KING, 12 Montana, 149.
(Pleading—Amendment) XV: 313.
- SCHWAB ET AL. v. OWENS ET AL., 10 Montana, 381.
(Chattel Mortgages) XI: 460, 481.
- SECOND NAT'L BANK v. KLEINSCHMIDT ET AL., 7 Montana, 146.
(Appeal for Delay—Penalty) XVI: 334.
- SHARMAN v. HUOT, 20 Montana, 555.
(Attachment) Distinguished XXI: 183.
- SHED v. BLAKELY, 6 Montana, 247.
(Married Women) X: 60.
- SHEEHEY v. FLAHERTY, 8 Montana, 365.
(Forcible Entry and Detainer) XI: 87; XIII: 507.
- SHERMAN v. HIGGINS, 7 Montana, 479.
(Appeal—Bill of Exceptions, etc.) VII: 486; VIII: 223; IX: 264; X: 298; XII: 312; XIII: 124; XVI: 116.
- SHILLING v. REAGAN ET AL., 19 Montana, 508.
(Injunction—Discretion) XXI: 542.
- SHOBER v. JACK, 3 Montana, 351.
(Objection to Evidence) XV: 149.
- SCHREVE v. COPPER BELL MINING CO., 11 Montana, 309.
(Mining Claims) XV: 252, 409, 411, 415; XVII: 136.
- SILVER BOW M. & M. CO. v. CLARKE ET AL., 5 Montana, 378.
(Mining Claims) V: 290, 293; VI: 98, 107, 108, 400, 401, 411, 412; XIII: 485; XVII: 161, 162; XXI: 349.
- SILVER BOW M. & M. CO. v. LOWRY, 6 Montana, 288.
(Sales) VII: 194; XXI: 284.
- SLOAN ET AL. v. GLANCY, 19 Montana, 70.
(Water Right—Appurtenance) XXI: 503.
- SMITH v. AUERBACH, 2 Montana, 348.
(Pleading) IX: 253.
- SMITH v. FREYLER ET AL., 4 Montana, 489.
(Suretyship) XIX: 127, 128, 204, 205.

- SMITH ET AL. v. HOPE MINING CO., 18 Montana, 432.
(Water Right—Abandonment) XIX: 77.
- SMITH ET AL. v. SHERMAN MINING CO., 12 Montana, 524.
(Mechanic's Lien) XIX: 458, 459.
- SMITH v. WILLIAMS, 2 Montana, 195.
(Statutory Construction) III: 250.
- SOUTHMAYD v. SOUTHMAYD, 4 Montana, 100.
(Mining Partnerships) XVIII: 489.
- SOYER ET AL. v. GREAT FALLS WATER CO., 15 Montana, 1.
(Nonsuit) XVII: 65; XVIII: 238; XIX: 453.
- SPIRLING v. CALFEE ET AL., 7 Montana, 514.
(Orders—Appeal) IX: 66, 347; XI: 226.
(Supplementary Proceedings) XI: 540; XIV: 83.
- STACKPOLE v. HALLAHAN, 16 Montana, 40.
(Appeals—New Trial) XVI: 383.
(Statutory Construction) XVII: 364; XVIII: 567; XX: 552.
(Election Laws) XVIII: 547; XIX: 255, 289.
- STAFFORD v. HORNBUCKLE ET AL., 3 Montana, 485.
Affirmed: 111 U. S. 389.
- STAPLETON v. PEASE, 2 Montana, 508.
(Undertaking on Appeal) XII: 457.
- STARR v. GREGORY CONSOL. MINING CO., 6 Montana, 485.
(Contracts) VI: 491.
- STATE v. AH JIM, 9 Montana, 167.
(Constitutional Law) IX: 238, 374; X: 148, 548; XIV: 479.
- STATE v. ANDERSON, 14 Montana, 541.
(Misconduct of Jury) XVIII: 81.
- STATE v. BAKER, 13 Montana, 160.
(Homicide—Instructions) XVIII: 61.
- STATE (EX REL. PIGOTT) v. BENTON, 13 Montana, 306.
(Election Law) XVI: 61; XVIII: 542.
(Nonsuit) XVIII: 255.
- STATE (EX REL. SPALDING) v. BENTON, 12 Montana, 66.
(Void Judgment) XIII: 9.
- STATE v. BIESMAN ET AL., 12 Montana, 11.
(Pleading) XVI: 86; XIX: 322.
(Dismissal of Appeal) XVI: 580.
- STATE v. BERNHEIM, 19 Montana, 512.
(Constitutional Law) XX: 233.
- STATE v. BIGGERSTAFF, 17 Montana 510.
(Improper Remarks of Counsel—Exceptions) XVIII: 81; XX: 588.
(Further Proceedings) XVIII: 86.
- STATE v. BLACK, 15 Montana, 143.
(New Trial) XVI: 575, 576; XVIII: 362, 364.
(Evidence—Objection) XVIII: 524.
(Instructions—Review) XVII: 361; XIX: 51, 238.
- STATE v. BLOOR, 20 Montana, 574.
(Referred to) XXI: 49.
(Information) XXI: 153.
- STATE (EX REL. LEACH) v. BOARD OF CANVASSERS, 13 Montana, 23.
(Estoppel) XVII: 394, 501.

STATE (EX REL. NORCROSS) v. BOARD OF MEDICAL EXAMINERS, 10 Montana, 162.

(Board of Medical Examiners) XII: 210; XIII: 376.

STATE (EX REL. NOLAN) v. BRANTLY, 20 Montana, 173.

(Habeas Corpus) XX: 181.

STATE v. BRETT, 16 Montana, 360.

(Information) XXI: 135, 136.

STATE v. BROADBENT, 19 Montana, 467.

(Intent) XX: 583.

STATE (EX REL. MILSTED) v. BUTTE CITY WATER CO., 13 Montana, 199.

(Pleading) XVIII: 385.

(Statutory Construction) XVIII: 567; XX: 552.

STATE v. CADOTTE, 17 Montana, 315.

(Remanding Case for Further Proceedings) XVII: 517.

STATE (EX REL. HARTMAN) v. CADWELL, 16 Montana, 119.

(Attorney—Disbarment) XVIII: 31.

STATE v. CAIN, 16 Montana, 561.

(Criminal Practice) XVI: 564.

STATE v. CAMP SING, 18 Montana, 128.

(Constitutional Law) XIX: 68; XX: 500.

STATE v. CARROLL ET AL., 13 Montana, 246.

(Intent) XIII: 401; XV: 427.

STATE (EX REL. JOHNSON) v. CASE, 14 Montana, 520.

(Title of Action ex Relatione) XV: 140.

(Justice of the Peace) XVI: 309.

(Certiorari) XVII: 519.

STATE (EX REL. KNIGHT) v. CAVE, 20 Montana, 468.

(Statutory Construction) XXI: 209.

STATE v. CLANCY, 20 Montana, 498.

(Instruction—Reasonable Doubt) XXI: 581.

STATE (EX REL. HARMON) v. CONROW ET AL., 19 Montana, 104.

(Assignment) XX: 196.

STATE (EX REL. BICKFORD) v. COOK, 17 Montana, 529.

(Claims Against the State) XVII: 567; XXI: 453.

STATE v. DAKIN, 15 Montana, 556.

(Appeal—Failure to File Brief) XVI: 303.

STATE (EX REL. N. W. NAT'L BANK) v. DICKERMAN, 16 Montana, 278.

(Pleading) XVIII: 241.

(Void Contract—Liability) XIX: 453.

(Constitutional Law) XX: 41.

STATE (EX REL. BARTLETT) v. DISTRICT COURT, 18 Montana, 481.

(Jurisdiction) XXI: 266.

STATE (EX REL. CALDWELL) v. DISTRICT COURT, 17 Montana, 329.

(Certiorari) XVII: 412.

STATE (EX REL. CONGDON) v. DISTRICT COURT, 10 Montana, 456.

(Estoppel) XVII: 501.

STATE (EX REL. GREENLAND) v. DISTRICT COURT, 13 Montana, 416.

(Title of Action ex Relatione) XV: 140.

- STATE (EX REL. KELLOGG) v. DISTRICT COURT, 13 Montana, 370.
(Appeal) XIX: 504.
- STATE (EX REL. N. Y. SHEEP CO.) v. DISTRICT COURT, 14 Montana, 577.
(Receiver—Appointment) Distinguished XVI: 459.
- STATE (EX REL. NIXON) v. DISTRICT COURT, 14 Montana, 396.
(Alimony) XV: 7.
- STATE (EX REL. SERES) v. DISTRICT COURT, 19 Montana, 501.
(Statutory Construction) XXI: 210.
- STATE (EX REL. T. T. M. CO.) v. DISTRICT COURT, 20 Montana, 284.
(Jurisdiction) XXI: 159.
- STATE (EX REL. MURPHY) v. DISTRICT JUDGE, 10 Montana, 401.
(Certiorari—Jurisdiction) X: 459; XV: 87, 90-93, 331; XVII: 332.
(Administrators) Distinguished XV: 89.
- STATE (EX REL. BEALL) v. ELLIS, 15 Montana, 224.
(Certiorari) XXI: 477.
- STATE (EX REL. GLEIM) v. EVANS, 13 Montana, 239.
(Justice of the Peace) XIII: 396, 399; XIV: 526, 539.
- STATE (EX REL. BROOKS) v. FRANSHAM, 19 Montana, 273.
(Election Law) XIX: 474.
- STATE (EX REL. SAM TOI) v. FRENCH, 17 Montana, 54.
(Licenses) XVIII: 137, 139, 140.
- STATE v. FRY, 10 Montana, 407.
(Appeal—New Trial) Distinguished XII: 298; XVI: 575, 576; XVII: 312; XVIII: 362.
- STATE v. GAWITH, 19 Montana, 48.
(Bill of Exceptions—Settlement) XX: 373.
- STATE v. GAY, 18 Montana, 51.
(Instructions) XX: 373.
(Improper Remarks of Counsel) XX: 588.
- STATE v. GIBBS, 10 Montana, 210.
(Appeals) XII: 85; XIII: 9, 534; XV: 146, 509; XVI: 576; XVIII: 364.
(Instructions—Reasonable Doubt) XX: 502, 503.
- STATE (EX REL. CRUSE SAVINGS BANK) v. GILLIAM, 18 Montana, 94.
(Mortgages) Reversed: XVIII: 109.
- STATE v. GLEIM, 17 Montana, 17.
(Instructions—Weight of Evidence) XVIII: 62.
- STATE (EX REL. PALMER) v. HICKMAN, 11 Montana, 541.
(Constitutional Law) XIII: 374.
- STATE (EX REL. ROTWITT) v. HICKMAN, 9 Montana, 370.
(Constitutional Law) IX: 394; X: 486, 499.
- STATE v. HUDSON, 13 Montana, 112.
(Forgery) Distinguished XV: 510; Distinguished XV: 540.
- STATE v. JACKSON, 9 Montana, 508.
(Improper Remarks of Counsel) XVII: 320.
(Misconduct of Jurors) XVIII: 81.
(Evidence) XVIII: 372.
- STATE v. JOHNSON, 20 Montana, 367.
(Statutory Interpretation) XX: 475.
- STATE (EX REL. METCALF) v. JOHNSON, 18 Montana, 548.
(Election Law) XVIII: 555.

- STATE (EX REL. BALDWIN) v. KELLOGG, 14 Montana, 426.
(Physicians and Surgeons) XIV: 452.
- STATE (EX REL. JOURNAL PUB. CO.) v. KENNEY, 9 Montana, 339.
(Mandamus) X: 497.
- STATE (EX REL. MATTOX) v. KENNEY, 11 Montana, 553.
(Constitution — Statutes — Interpretation) XIII: 63.
- STATE (EX REL. THOMPSON) v. KENNEY, 9 Montana, 223.
(Constitutional Law) IX: 374; XIV: 479.
(Mandamus) XIII: 28.
(Election Law) XIII: 322.
- STATE (EX REL. WADE) v. KENNEY, 10 Montana, 485.
(Appropriations) XI: 555.
- STATE v. KING, 9 Montana, 445.
(Principal—Accessory) XVII: 23.
- STATE v. LEE, 13 Montana, 248.
(Evidence) Distinguished XVI: 569.
- STATE (EX REL. BRAY) v. LONG ET AL., 21 Montana, 26.
(Constitutional Law) XXI: 215.
- STATE v. MALISH, 15 Montana, 506.
(Information) XV: 540.
- STATE v. MANSFIELD, 19 Montana, 483.
(Facts of the Case) XX: 181.
(Information) Distinguished XXI: 136.
- STATE v. MARION ET AL., 14 Montana, 458.
(Indictment—Criminal Judgment) XIV: 462.
- STATE (EX REL. WILLIAMS) v. MAYHEW ET AL., 21 Montana, 93.
(New Counties) XXI: 467.
- STATE (EX REL. ROOT) v. McHATTON, 10 Montana, 370.
(District Court—Terms) XI: 82; Distinguished XXI: 104-105.
- STATE v. METCALF, 17 Montana, 417.
(Witnesses) XX: 586; XXI: 588, 589.
- STATE (EX REL. PIERSON) v. MILLIS, 19 Montana, 444.
(Appeal from Order—Record) XIX: 560.
- STATE (EX REL. COPE) v. MINAR, 13 Montana, 1.
(Appeal—Jurisdiction) Distinguished XVII: 464.
- STATE v. MITCHELL, 17 Montana, 67.
(Constitutional Law) XVIII: 137; XIX: 68; XX: 437.
- STATE (EX REL. BEGEMAN) v. NAPTON, 10 Montana, 369.
(Appeals) XII: 248.
- STATE (EX REL. NEWELL) v. NEWELL, 13 Montana, 302.
(Habeas Corpus) XIII: 423, 424.
(“Action”) XV: 471.
- STATE v. NORTHRUP, 13 Montana, 522.
(Appeal by the State) XIII: 552, 555; XX: 191.
(Appeals) XV: 146, 509; XVI: 576; XVIII: 364.
(New Trial—Appeal) XVIII: 362.
(Information—Murder) XVII: 420.
- STATE v. O'BRIEN, 18 Montana, 1.
(Statutory Construction) XVIII: 567; XX: 552.
(Former Appeal) XIX: 6.
- STATE v. OLIVER, 20 Montana, 318.
(Robbery—Instruction) Distinguished XXI: 144.

- STATE v. OWSLEY ET AL., 17 Montana, 94.
(Taxation) XVIII: 151.
- STATE v. PILGRIM, 17 Montana, 311.
(New Trial—Specification of Errors—Appeal) XVII: 366; XVIII: 364.
- STATE (EX REL. BUCK) v. RAVALLI COUNTY COMMISSIONERS,
21 Montana, 469.
(Pleading) XXI: 483, 486.
- STATE v. RAYMOND, 12 Montana, 226.
(License Law) XVIII: 151.
- STATE (EX REL. MATTS) v. REEK, 18 Montana, 557.
(Elections) XVIII: 560; XIX: 285.
- STATE (EX REL. SLIGH) v. REEK, 18 Montana, 561.
(Elections) XVIII: 563.
- STATE (EX REL. EAVES) v. RICKARDS ET AL., 16 Montana, 145.
(State Furnishing Board) XXI: 48.
- STATE (EX REL. AACHEN, ETC., INS. CO.) v. ROTWITT, 17 Montana, 41.
(Statutes—Repeal) XVII: 485; XX: 317, 434; XXI: 233.
(Foreign Corporations) XVIII: 91, 94, 418.
- STATE (EX REL. LLOYD) v. ROTWITT, 15 Montana, 29.
(Constitutional Law) XIX: 68.
- STATE (EX REL. WOODY) v. ROTWITT, 18 Montana, 502.
(Elections) XVIII: 542, 543, 552, 558, 560; XIX: 285.
- STATE v. RUSSELL, 13 Montana, 164.
(Witnesses) XVII: 425; XXI: 588.
(Dying Declarations) XVIII: 63.
- STATE v. RYAN, 12 Montana, 297.
(Circumstantial Evidence—Instruction) XII: 300.
- STATE v. SCHULTZ, 11 Montana, 429.
(Board of Medical Examiners) XI: 435; XIII: 376.
- STATE v. SMITH, 12 Montana, 378.
(Assault with Intent to Murder) XIV: 72, 73.
- STATE v. SULLIVAN, 9 Montana, 174.
(Instruction—Weight of Evidence) XVII: 29, 364.
- STATE v. SULLIVAN, 9 Montana, 490.
(Idem Sonans) Distinguished X: 561.
(Costs) XIV: 385.
- STATE v. THOMPSON, 10 Montana, 549.
(New Trial) XIII: 536.
- STATE (EX REL. ZEHNTNER) v. TIPTON, 15 Montana, 74.
(Evidence—Instruction) XVII: 216.
- STATE (EX REL. RUSSEL) v. TOOKER, 18 Montana, 540.
(Practice—Form of Action) XVIII: 553.
(Election Law) XIX: 285.
- STATE (EX REL. WOODS) v. TOOKER, 15 Montana, 8.
(Mandamus) XV: 38.
(Constitutional Law) XVII: 77; XVIII: 137; XIX: 68.
- STATE v. VINEYARD, 16 Montana, 138.
(Forgery) XVI: 370.
- STATE v. WHALEY, 16 Montana, 574.
(New Trial—Appeal—Review) XVI: 580, 581; XVII: 312, 361; Distinguished XVIII: 5; XVIII: 362, 364.

- STEBBINS v. MORRIS, 19 Montana, 115.
(Husband and Wife) XIX: 158, 159.
- STEBBINS v. SAVAGE ET AL., 5 Montana, 253.
(Appealable Order) XVI: 64.
(Receiver) XVI: 230.
- STEELE v. GILPATRICK, 18 Montana, 453.
(Statutory Construction) XXI: 233.
- STEVENSON v. CADWELL, 14 Montana, 311.
(Rules of Court) XXI: 186.
- STEWART v. BUDD, 7 Montana, 573.
(Pleading) XVIII: 241.
- ST. LOUIS M. & M. CO. v. MONTANA CO., 9 Montana, 288.
(Examination of Mining Property—Equity) IX: 476.
- STORY v. BLACK ET UX., 5 Montana, 26.
Affirmed: 119 U. S. 235.
(Appeal—Review) VI: 134.
(Attachment) VII: 539; X: 471.
(Findings — Evidence — Appeal — Review) VIII: 336; XI: 274; XVI: 430.
- STORY ET AL. v. CORDELL ET AL., 13 Montana, 204.
(Sales—Delivery) XX: 238.
- STORY v. MACLAY, 3 Montana, 480.
(Evidence) IV: 467.
- SULLIVAN v. CITY OF HELENA, 10 Montana, 134.
(Municipal Corporations) X: 147; XV: 280, 281, 282.
(Practice) XIII: 135.
(Statutes) XX: 526.
- SULLIVAN v. DUNPHY, 4 Montana, 499.
Affirmed: 117 U. S. 346.
(Pleading) XI: 495.
- SWEENEY v. CITY OF BUTTE, 15 Montana, 274.
(Question for Jury) XVII: 37.
- SWEENEY v. GREAT FALLS ETC., RY. CO., 11 Montana, 34.
(Former Appeal) XI: 527.
(New Trial—Appeal—Bill of Exceptions—Waiver) XII: 261; XIV: 77;
XV: 555; XVI: 577; XXI: 187.
- SWEENEY v. GREAT FALLS, ETC., RY. CO., 11 Montana, 523.
(Pleading) XII: 191, 533.
(Nonsuit—Evidence) XIV: 336.
- SWEENEY v. SCHLESSINGER, 18 Montana, 326.
(Execution Creditor—Pleading) XXI: 411.
- SWEETLAND v. BARRETT, 4 Montana, 217.
(Pleading) V: 493.
- SWEETLAND v. OLSEN, 11 Montana, 27.
(Water Right—Appurtenance) XV: 316; XVIII: 438; XIX: 76; XXI: 503.
(Water Right—Real Estate) XV: 572.
- SWENSON v. KLEINSCHMIDT ET AL., 10 Montana, 473.
(Pleading) XII: 466.
- TALBOTT ET AL. v. KING ET AL., 6 Montana, 76.

- (Mining Claims) VI: 168, 400, 401, 411; XIV: 289, 290, 291; XVII: 161, 162; XXI: 349.
- TAYLOR v. ASHBY**, 3 Montana, 248.
(Statutory Construction) XVII: 314.
- TAYLOR ET AL. v. HOLTER ET AL.**, 1 Montana, 688.
(Deeds—Acknowledgment) IV: 485; XV: 574, 578, 579.
(Deeds—Interpretation) VI: 274; XI: 324.
- TAYLOR v. HOLTER**, 2 Montana, 476.
(New Trial—Appeal—Bill of Exceptions—Specification of Errors, etc.) III: 437; X: 298; XI: 438.
- TEITIG ET AL. v. BOESMAN BROS. & CO.**, 12 Montana, 404.
(Supplementary Proceedings—Creditor's Bill) XIV: 84.
- TERRITORY v. ADOLFSON**, 5 Montana, 237.
(Conviction of Murder—Insufficient Proof) VI: 473.
- TERRITORY v. BELL & LANE**, 5 Montana, 562.
(Bill of Exceptions) VI: 12.
- TERRITORY v. BRYSON**, 9 Montana, 32.
(Jurors—Competency) XII: 541.
(Evidence—Objections—Exceptions) XV: 148.
- TERRITORY v. BURGESS**, 8 Montana, 57.
(Jurors—Misconduct, etc.) XIV: 545-548; XV: 271; XVIII: 81.
(Homicide—Self-Defense—Instruction) XVIII: 11.
- TERRITORY v. BURNS**, 6 Montana, 72.
(Indictment) VI: 17; IX: 180, 181.
- TERRITORY v. CARLAND**, 6 Montana, 14.
(Waiver of Defects in Indictment) XV: 508.
- TERRITORY v. CARSON ET AL.**, 7 Montana, 417.
(Bond—Liability of Sureties) IX: 135.
(Constitutional Law—Officers) XI: 412.
- TERRITORY v. CLAYTON**, 8 Montana, 1.
(Amendment of Court Records) VIII: 308; IX: 345; Distinguished X: 437; XIV: 207; XVI: 304; XXI: 107, 139.
(Grand Juror) X: 265.
(Evidence—Res Gestae) XVI: 345.
- TERRITORY v. CORBETT**, 3 Montana, 50.
(Instructions) IX: 69.
(Change of Venue) XI: 23.
- TERRITORY (KENNA) v. COX**, 3 Montana, 197.
(Pleading) IX: 248; XI: 533; XII: 533.
- TERRITORY v. DOOLEY**, 4 Montana, 295.
(Assault) IX: 11.
- TERRITORY v. DOYLE**, 7 Montana, 245.
(Recent Possession of Stolen Property) IX: 176.
- TERRITORY v. DUNCAN**, 5 Montana, 478.
(Appeal—Indictment—Judgment) X: 543.
(Burglary—Intent) XIII: 247.
- TERRITORY v. EDMONSON**, 4 Montana, 141.
(Homicide—Mitigating Circumstances—Burden of Proof) IV: 148.
- TERRITORY v. FALLIS**, 2 Montana, 236.
(Appeals) II: 394; XIII: 403.
- TERRITORY v. FARNSWORTH**, 5 Montana, 303.
Dismissed: 129 U. S. 104.

- (Commercial Traveler) V: 325.
TERRITORY v. FLOWERS, 2 Montana, 392.
(Appeal) V: 247; VIII: 172.
- TERRITORY v. FLOWERS**, 2 Montana, 531.
(Jurisdiction) III: 53.
- TERRITORY v. FOX**, 3 Montana, 440.
(Burglary—Indictment) VIII: 522.
(Burglary—Instruction) XV: 428.
- TERRITORY v. HANNA**, 5 Montana, 246.
(Appeal) VII: 385, 432; X: 212; XIII: 8, 9, 534; XV: 146, 509; XVI: 576; XVIII: 364, 365.
- TERRITORY v. HANNA**, 5 Montana, 248.
(Witnesses) VI: 472; VIII: 9; Distinguished XIII: 169; XVII: 425; XX: 586; XXI: 588.
- TERRITORY v. HARDING**, 6 Montana, 323.
(Qualification of Grand Juror—Waiver) VII: 58, 497; VIII: 7, 9.
(Special Prosecuting Attorney) VII: 227.
(Continuance) VIII: 105; IX: 13; X: 217, 218.
- TERRITORY v. HARRIS**, 7 Montana, 384.
(Appeal) X: 212; XII: 85.
- TERRITORY v. HARRIS**, 7 Montana, 429.
(Appeal) X: 212.
- TERRITORY v. HART**, 7 Montana, 42.
(Former Appeal) VII: 493.
(Instructions) VII: 502.
(Indictment) VII: 495; IX: 72; XII: 386.
(Objection to Juror—Waiver) VII: 497; XV: 249.
- TERRITORY v. HART**, 7 Montana, 489.
(Jurors) VIII: 7.
(Insanity—Nonprofessional Witnesses) IX: 15.
(Former Jeopardy) X: 562.
(Misconduct of Jury) XV: 271.
(Instructions) XXI: 587.
- TERRITORY v. HILDEBRAND**, 2 Montana, 426.
(Pleading) III: 172.
- TERRITORY v. JASPAR ET AL.**, 7 Montana, 1.
(Indictment) IX: 181.
- TERRITORY v. LAUN**, 8 Montana, 322.
(Appeal by the State) Distinguished IX: 8; XIII: 530, 532, 533; Disapproved XIII: 549.
- TERRITORY v. LEE**, 2 Montana, 124.
(Mineral Lands—Allens) Distinguished IV: 540.
- TERRITORY v. MACKEY**, 8 Montana, 168.
(Indictment—Evidence) Distinguished IX: 3.
(Mining Claims) XI: 336; Distinguished XI: 342.
- TERRITORY v. MANTON**, 7 Montana, 162.
(Former Appeal) VIII: 101.
(Murder by Neglect) VIII: 107.
(Instructions Presuming Guilt) Distinguished IX: 31.
- TERRITORY v. MANTON**, 8 Montana, 95.
(Homicide—Burden of Proof) VIII: 120.
(Change of Venue) XI: 23, 26; XIII: 167.

- TERRITORY v. McANDREWS**, 3 Montana, 158.
 (Instruction—Reasonable Doubt) III: 139; X: 220; XVI: 143; XVII: 31; XX: 502; XXI: 581.
 (Indictment) V: 243; VII: 169; VIII: 352.
 (Instructions — Objection — Exception) XV: 148.
 (Instruction—Circumstantial Evidence) XVII: 29.
- TERRITORY v. McCLIN**, 1 Montana, 394.
 (Conviction on Confessions) VI: 13.
 (Exceptions) VII: 41.
- TERRITORY v. MILROY**, 7 Montana, 559.
 (Appeal—Undertaking) XII: 457.
 (Appeals—Review) XIV: 314.
- TERRITORY v. MILROY**, 8 Montana, 361.
 (Indictment) XII: 544.
- TERRITORY v. MOONEY**, 8 Montana, 151.
 (Appeal Without Argument or Brief) XV: 432, 557; XVI: 303.
- TERRITORY v. MURRAY ET AL.**, 7 Montana, 251.
 (Contempt—Jurisdiction) VIII: 27; XI: 70; Distinguished XI: 136; XVII: 148.
- TERRITORY v. OWINGS**, 3 Montana, 137.
 (Instruction—Reasonable Doubt) X: 220.
- TERRITORY v. PERKINS**, 2 Montana, 467.
 (Continuance) II: 540; VI: 332; Disapproved VI: 334-339; Expressly not affirmed VIII: 106; IX: 13; X: 217.
- TERRITORY (EX REL. TANNER) v. POTTS**, 3 Montana, 364.
 (Practice—Entitling Action) XIII: 422; XIV: 522; XV: 140; XVIII: 541.
- TERRITORY v. REHBERG**, 6 Montana, 467.
 (Cross-examination) XIII: 385; XVIII: 371. 372.
 (New Trial—Specification of Errors) XV: 146.
- TERRITORY v. REUSS**, 5 Montana, 605.
 (Appeal—Verdict—Evidence) VI: 226, 501; X: 506; XVI: 431.
- TERRITORY v. ROBERTS**, 9 Montana, 12.
 (Appeal—Briefs—Argument) XV: 432, 558; XVI: 303.
- TERRITORY (EX REL. FISK) v. RODGERS**, 1 Montana, 252.
 Affirmed by U. S. Supreme Court (not reported).
 (Pleading) X: 168.
- TERRITORY v. ROWAND**, 8 Montana, 110.
 (Pleading and Proof—Variance) Disapproved: VIII: 121; Affirmed on Rehearing VIII: 432; Disapproved VIII: 438.
- TERRITORY v. SCOTT**, 7 Montana, 407.
 (Homicide — Degrees — Instruction) XIII: 163.
- TERRITORY (EX REL. McCANN) v. SHERIFF**, 6 Montana, 297.
 (Insane Persons) XII: 203.
- TERRITORY v. SHIPLEY**, 4 Montana, 468.
 (Indictment) V: 564; VIII: 129.
- TERRITORY v. STANTON**, 8 Montana, 157.
 (Appeal—Failure to Show Error) XIII: 223; XV: 432, 557; XVI: 303.
- TERRITORY v. STEARS**, 2 Montana, 324.
 (Murder—Degrees—Verdict) Distinguished II: 473; VII: 169; IX: 30.
 (Murder—Indictment) III: 161; V: 243; VIII: 117, 352; XIII: 538; XVII: 420.

- (Statutory Construction) XX: 552.
TERRITORY v. STOCKER, 9 Montana, 6.
(Criminal Law—Verdict) XIII: 401; XIV: 403.
TERRITORY (EX REL. BLAKE) v. VIRGINIA ROAD CO., 2 Montana, 96.
(Sufficiency of Complaint) III: 419, 476; V: 12; VII: 233.
(Corporations—Forfeiture of Franchises) IX: 416.
TERRITORY v. WHITCOMB ET AL., 1 Montana, 359.
(Fornication) Distinguished VII: 3.
(Instruction—Jury) XI: 509.
TERRITORY v. WILLARD ET AL., 8 Montana, 328.
(Former Jeopardy) IX: 11.
(Intent) XIII: 247, 401.
(Former Acquittal) XIV: 403.
(Burglary—Instructions) XV: 428.
TERRITORY v. YOUNG, 5 Montana, 242.
(Appeals—Transcript) VII: 433.
(Indictment) VIII: 352; XIII: 539.
(Appeal—Evidence—Review) XVIII: 252.
THAMLING v. DUFFEY, 14 Montana, 567.
(Burden of Proof) Construed and Modified XVIII: 376, 377; XIX: 416.
THOMAS v. CHAMBERS ET AL., 14 Montana, 423.
(Judgment by Default) XVI: 92.
THORP ET AL. v. FREED ET AL., 1 Montana, 651.
(Specification of Errors) II: 477; XVI: 200.
(Opinion of District Court) XIII: 265; XVI: 278.
TIBBITTS v. AH TONG, 4 Montana, 536.
(Mining Claims) IV: 535; IX: 286; Distinguished XI: 445, 446; XIX: 498.
TOOMBS v. HORNBUCKLE ET AL., 1 Montana, 286.
Affirmed: 18 Wall. (U. S.) 648.
(Water Right—Diversion) III: 225.
(Verdict—Evidence—Review) VI: 226, 245, 286, 501; X: 506; XI: 274; XVI: 430.
(Pleading) XV: 346.
TRACY v. HARMON, 17 Montana, 465.
(Appeal—Sufficiency of Complaint) XIX: 130.
TRAVIS ET AL. v. McCORMICK, 1 Montana, 143.
(Former Appeal) I: 347.
TRAVIS ET AL. v. McCORMICK, 1 Montana, 347.
(Appeal—Evidence—Review) VI: 245, 501; X: 506; XI: 274; XVI: 430.
TUCKER ET AL. v. JONES, 8 Montana, 225.
(Exceptions to Evidence) IX: 43; XV: 148.
(Water Right—Appurtenance) XI: 29; XV: 316; XIX: 76; XXI: 503.
(Water Right—Abandonment) XV: 576; XVIII: 438.
(Water Right—Appropriation) XIX: 84.
TUDOR ET AL. v. DE LONG ET AL., 18 Montana, 499.
(Fraud—Pleading) XIX: 358.
TUTTLE v. MERCHANTS' NAT'L BANK, 19 Montana, 11.
(Assignment—Delivery) XIX: 108.
(Appeal—Review) XXI: 148.
TWELL v. TWELL ET AL., 6 Montana, 19.

(Appeal—Evidence—Review) VII: 106; IX: 588; XV: 316; XVIII: 252, 255.

(Creditor's Bill) VII: 284.

UNDERWOOD v. BIRDSSELL ET AL., 6 Montana, 142.

(Liens—Principal and Agent) Distinguished VII: 390, 391.

UNITED STATES v. ENSIGN, 2 Montana, 396.

(Practice) III: 48; VI: 386.

(Scire Facias) XXI: 574.

(Judgment—Revivor by Suit) XXI: 575.

UNITED STATES v. FOX, 3 Montana, 512.

(Criminal Law—Right of Speedy Trial) Distinguished XIII: 554.

UNITED STATES v. McELROY, 2 Montana, 237.

(Appeals) II: 394.

UNITED STATES v. 196 BUFFALO ROBES, 1 Montana, 489.

(Repeals by Implication) XVII: 484.

UNITED STATES v. POWER, 6 Montana, 271.

(Contracts—Interpretation) XI: 324.

UNITED STATES v. SMITH, 2 Montana, 487.

(Criminal Practice—Appeal) VI: 469.

UNITED STATES v. UPHAM, 2 Montana, 113.

(Criminal Law—Jury—Challenges) III: 457, 526.

UNITED STATES v. WILLIAMS ET AL., 6 Montana, 379.

(Public Lands) VII: 340, 406.

(Actions) VIII: 28.

(Former Appeal) VIII: 90.

(Pleading) XI: 495.

UPTON ET AL. v. LARKIN ET AL., 5 Montana, 600.

(Mining Claims) VII: 457.

UPTON ET AL. v. LARKIN ET AL., 7 Montana, 449.

(Mining Claims) VIII: 247, 377, 378; X: 293.

(Record on Appeal) IX: 264; XI: 451.

VANTILBURG v. BLACK, 3 Montana, 459.

(Married Women) IV: 100; IX: 313.

(Setting Aside Judgment) VII: 381, 382.

VANTILBURGH v. BLACK, 2 Montana, 371.

(Title—Merger) XIV: 87.

VANTILBURGH v. HAMILTON, 2 Montana, 413.

(Appeal—Evidence—Review) XVI: 430.

VAUGHN v. DAWES, 7 Montana, 360.

(Attachment—Motion to Dissolve) IX: 403, 475; XVIII: 472.

VAUGHN v. SCHMALSLE ET AL., 10 Montana, 186.

(Lien of Judgment) XIV: 185.

VOSE v. WHITNEY ET AL., 7 Montana, 385.

(Sheriff) IX: 135.

WALL v. HELENA STREET RY. CO., 12 Montana, 44.

(Contributory Negligence) XVI: 23; XVII: 377, 388; XIX: 100.

WALLACE ET AL. v. LEWIS ET AL., 9 Montana, 399.

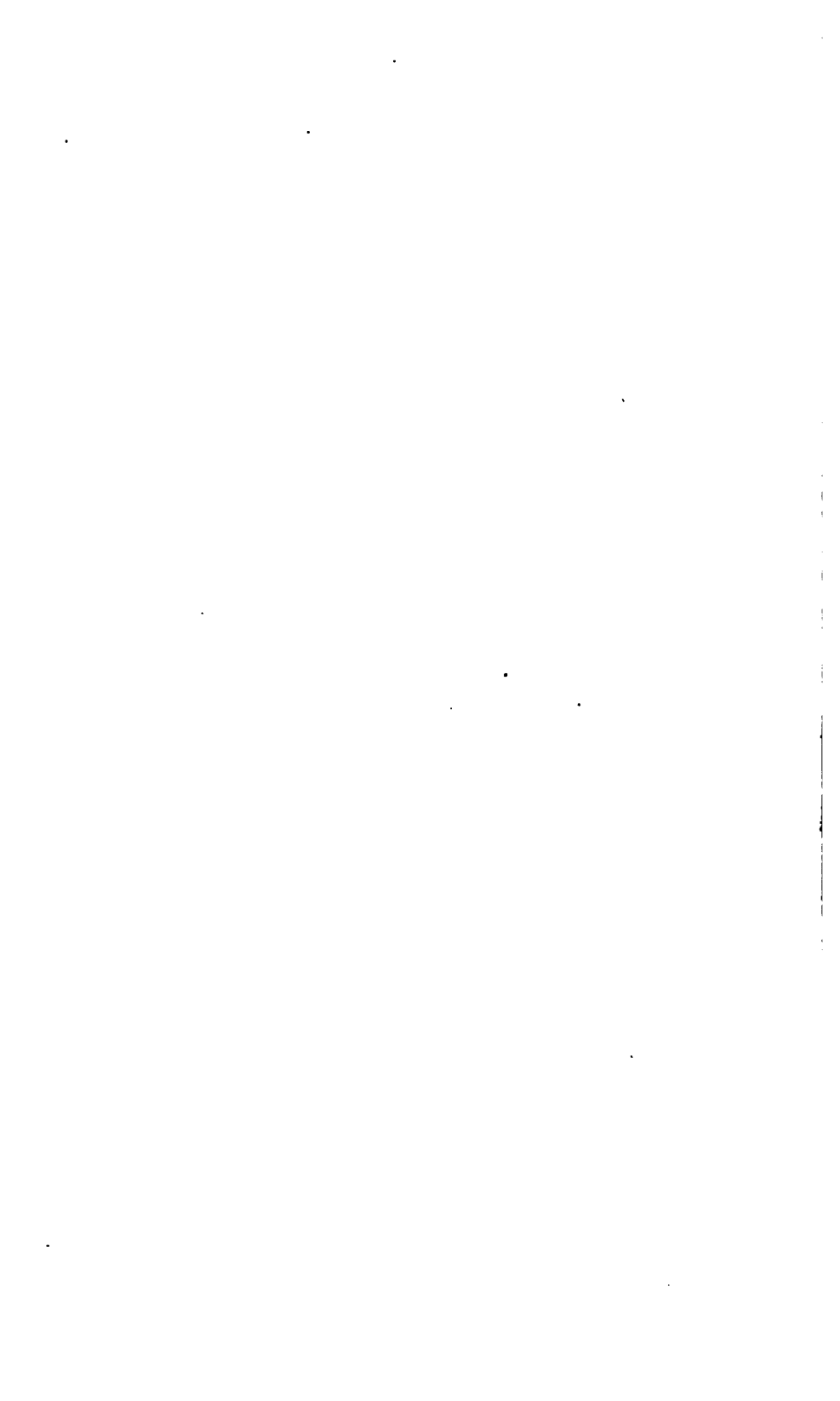
(Motions) X: 208; XII: 575; XIII: 501; XVI: 309.

WALLACE ET AL. v. OWSLEY, 11 Montana, 219.

(Change of Venue) XV: 470; XIX: 373.

- WALSH v. BLAKELY, 6 Montana, 194.
(Stoppage in Transitu) VII: 160.
(Sale and Delivery) XV: 554.
- WALSH ET AL. v. MUELLER ET AL., 14 Montana, 76.
(Bill of Exceptions—Settlement) XV: 556; Distinguished XXI: 125.
- WALSH ET AL. v. MUELLER ET AL., 16 Montana, 180.
(Instructions—Error) XIX: 388.
- WARD v. COMMISSIONERS OF GALLATIN COUNTY, 12 Montana, 23.
(Taxation) XIV: 319.
- WASTLE v. MONTANA UNION RY. CO., 17 Montana, 213.
(Witness — Evidence — Instructions) XVII: 474; XVIII: 62.
- WATERBURY v. COMMISSIONERS OF DEER LODGE CO., 10 Montana, 515.
(Garnishment) XI: 66.
- WATKINS ET AL. v. MORRIS ET AL., 14 Montana, 354.
(Appeal—Bond) XIX: 94.
- WATSON v. O'NEILL ET AL., 14 Montana, 197.
(Bonds) XIX: 53, 54; XXI: 198.
- WEAVER v. ENGLISH, 11 Montana, 84.
(Pleading) Distinguished XIX: 227.
- WEIBOLD v. DAVIS, 7 Montana, 107.
Reversed: 139 U. S. 507.
(Mining Claims) XV: 409.
- WELLS v. CLARKSON, 2 Montana, 230.
(Set-off) II: 379; V: 343.
- WELLS v. CLARKSON, 2 Montana, 379.
(Set-off) III: 145, 183.
- WELLS, FARGO & CO. v. CLARKSON ET AL., 5 Montana, 336.
(Judgments) XVI: 558.
- WENNER v. McNULTY ET AL., 7 Montana, 30.
(Mining Claims) X: 293; XVI: 235.
- WETHEY v. KEMPER, 17 Montana, 491.
(Corporations—Pleading) XVIII: 166.
(Penal Statutes) XVIII: 442.
- WETZEL ET AL. v. POWER ET AL., 5 Montana, 214.
(Delivery to Common Carriers) VI: 198; VII: 161.
- WHITESIDE v. LOGAN, 7 Montana, 373.
(Default Judgments) VII: 484; Distinguished IX: 88; IX: 408; XII: 575; XXI: 164.
- WIBAUX v. GRINNELL LIVE STOCK CO. ET AL., 9 Montana, 154.
(Liability on Bond—Principal and Surety) XIII: 72, 74, 365, 366;
XIV: 135; XVII: 453.
- WIEBOLD v. HERMANN, 2 Montana, 609.
(Pleading) II: 543; III: 154; Distinguished V: 232.
- WIGGIN v. FINE, 17 Montana, 575.
(Partnership) XVIII: 493.
- WILLIAM (WILLMAN) MERC. CO. v. FUSSY, 13 Montana, 401.
(Nonsuit—Appeal) XVIII: 254.
- WILLISTON v. CAMP ET AL., 9 Montana, 88.
(Assignment—Agency) XXI: 423.
- WILLMAN MERC. CO. v. FUSSY, 15 Montana, 511.
(Sales) XV: 554.

- WILSON v. DAVIS ET AL., 1 Montana, 98.
 (Jurisdiction) II: 159, 503.
 (Nonappealable Order) XVI: 64.
- WILSON v. DAVIS, 1 Montana, 183.
 (Interest) III: 155; VIII: 185, 320.
 (Pleading) V: 11.
- WILSON ET AL. v. HARRIS ET AL., 19 Montana, 69.
 (Fraud—Finding) XXI: 415.
 (Disqualification of Justice of Supreme Court, etc.) XXI: 431, 432, 433.
- WILSON ET AL. v. HARRIS ET AL., 21 Montana, 374.
 (Attachment—Evidence) Disapproved XXI: 434-440.
- WOLVERTON ET AL. v. NICHOLS ET AL., 5 Montana, 89.
 Reversed: 119 U S 485.
 (Practice—Pleading) VI: 130; XII: 498; XIX: 230.
- WOODWARD v. WEBSTER, 20 Montana, 279.
 (New Trial—Settlement of Statement) XXI: 125.
- WOODMAN v. CALKINS ET AL., 13 Montana, 363.
 (Principal and Sureties) XIV: 135; XVII: 453.
- WOODS v. BERRY, 7 Montana, 195.
 (Instructions—Exceptions) VII: 298, 601; XVIII: 363, 364.
- WOOLMAN v. GARRINGER ET AL., 1 Montana, 535.
 (Legal and Equitable Relief in the Same Action) I: 473.
 (Water Rights) XI: 390; XV: 573; XX: 268.
- WOOLMAN v. GARRINGER, 2 Montana, 405.
 (New Trial) II: 557; XV: 532.
 (Judgment) III: 191; XVI: 62, 383.
 Appeal—Remanding Case for Further Proceedings) XV: 194.
- WORMALL v. REINS, 1 Montana, 627.
 (Pleadings—Amendment) II: 417; Distinguished II: 420; III: 453, 508;
 VI: 500.
 (Continuance) II: 471, 540.
- WORTMAN v. KLEINSCHMIDT ET AL., 12 Montana, 316.
 (Attorney's Fees) Disapproved XII: 350; XIII: 462; XVI: 69, 70; Dis-
 approved XVI: 70; XVIII: 536.
- WRIGHT v. FIRE INS. CO., 12 Montana, 474.
 (Nonsuit) XVII: 65.
- WULF v. MANUEL, 9 Montana, 279.
 (Title Through Alien) Distinguished XI: 445.
 (Pleadings—Issue) XIII: 519; XV: 249.
- WYKOFF v. LOEBER, 5 Montana, 535.
 (Jury—Filling Panel) Distinguished XII: 245.
 (Appeal for Delay—Penalty) XVI: 334.
- YELLOWSTONE NAT'L BANK v. GAGNON, 19 Montana, 402.
 (Negotiable Paper) XIX: 441.
- YOPE v. MURPHY, 10 Montana, 304.
 (Change of Venue) XI: 221; XIX: 373.
- ZICKLER v. DEEGAN ET AL., 16 Montana, 198.
 (New Trial—Specifications of Error) XVIII: 529, 531.
 (Equity—Jury) XXI: 287.



INDEX.

ACCESSORY AND ACCOMPLICE.

See CRIMINAL LAW, 27, 29, 41, 42.

ACTION.

As to Abatement and Revival, see CONTRACTS, 12.

As to Action for the Recovery of Mining Claims, see MINES AND MINING, 21.

ADVERSE POSSESSION.

See MINES AND MINING, 21.

AGENCY.

See PRINCIPAL AND AGENT.

ALIBI.

See CRIMINAL LAW, 36, 37.

APPEAL.

See RULES OF THE SUPREME COURT.

New Trial—Insufficiency of the Evidence to Justify the Verdict.

1. The Supreme Court will not disturb the action of a trial judge in setting aside a verdict, where he is satisfied that it is not warranted by the evidence.—*Patten v. Hyde*, 23; *Butte & Boston Mining Co. v. Societe Anonyme d. M. d. L.*, 204.

Jurisdiction—Dismissal.

2. An appeal from a judgment, not taken within one year after its entry, as required by Compiled Statutes 1887, Division 1, Section 421, and Code Civil Procedure 1896, Section 1722, will be dismissed for want of jurisdiction.—*Gallagher v. Corneltus*, 27.

Trial by Referee—Lack of Findings—Request for Findings.

3. Where it does not appear from the record that appellant requested findings in writing by a referee, as required by Code Civil Procedure, Section 1114, as a condition to reversal for want of findings, he cannot complain of the referee's failure to make findings.—*Id.*

Trial by Referee—Objections to Findings—Bill of Exceptions.

4. Unless objections and exceptions to findings of a referee, for defects therein, are settled in a bill or statement, as required by Code of Civil Procedure, Section 1115, they are not properly a part of the transcript on appeal, and will not be considered.—*Id.*

Order Refusing New Trial—Specification of Errors of Law.

5. Errors of Law on Appeal from an order refusing a new trial cannot be reviewed where a specification of such errors was omitted from the statement of the case on the motion therefor.—*Id.*

Defective Brief—Dismissal of Appeal.

6. Where the brief of defendant does not contain specifications of errors, nor ab-

strat, nor statement of the case, as required by the Supreme Court, Rule 5, Subdivision 3, the appeal will be dismissed.—*Anderson v. Carlson*, 48.

Defective Brief—Dismissal of Appeal.

7. A brief filed by appellant, which does not, in the statement of the case, make appropriate references to the transcript, showing where therein evidence of witnesses or pleadings are to be found, or which does not specify errors complained of in accordance with Supreme Court Rule 5, is so defective as to justify the courts in dismissing the appeal.—*Smith v. Denniff*, 65.

Penal Code—Jurisdiction—Dismissal.

8. The Appellate Court is without jurisdiction to consider an appeal, where the record contains no copy of the notice of appeal, as prescribed by Penal Code, Sec. 2281.—*City of Butte v. Call*, 94.

Murder—Verdict of Conviction Supported by Evidence.

9. A verdict of conviction of murder will not be disturbed where there is evidence to support it. It is not the province of the appellate court to usurp the office of the jury or the function of the trial court.—*State v. Allen*, 118.

Instructions—Appellant Must Point Out Error.

10. Where appellant complains of the charge, but points out nothing to his prejudice, it is not incumbent on the Court to search for possible errors.—*Id.*

Conflict of Evidence—Conclusive Presumption.

11. Where there is a substantial conflict in the testimony, the appellate court will indulge the conclusive presumption that the decision of the lower court is supported by the weight of the evidence.—*Id.*

Misconduct of Juror—Verdict.

12. Where jurors in a capital case agreed upon a verdict of guilty on the third ballot, to which all agreed when polled, it will not be set aside because one of them stated in the jury room, before the informal ballot was taken, that he was "willing a majority should rule."—*State v. Brooks*, 146.

New Trial—Conflict of Evidence.

13. Where the court sustained a motion for a new trial, and did not expressly exclude the ground that the verdict was against the evidence, the ruling will be sustained on appeal, where there appears to be a conflict of evidence.—*Butte & Boston Mining Co. v. Societe Anonyme d. M. d. L.*, 177.

Rule of Stare Decisis.

14. The rule of stare decisis will be observed where it is apparent that no substantial injury or injustice will result therefrom.—*Deloughrey v. Hinds*, 260.

Only Appellant's Exceptions Considered On Appeal.

15. The only exceptions which may be considered on appeal are those taken by, or preserved to, the appellant.—*O'Rourke v. Schultz*, 235.

Former Appeal—Law of the Case.

16. Where, on appeal from an action to enforce a rescission of a contract for the sale of property represented by corporate shares, it was determined that the identical shares originally owned by plaintiff need not be returned, but any shares representing the value of the property might be tendered, such determination is the law of the case on a subsequent appeal of a proceeding to restrain the enforcement of the judgment.—*Id.*

Appealable Judgments and Orders.

17. An appeal is authorized by statute only, and, unless the subject matter of an appeal falls fairly within the statute, the appeal does not lie.—*Tuohy's Estate*, 365.

Appeals In Probate Proceedings.

18. Under Code of Civil Procedure, Section 1722, as amended by Session Laws 1899, p. 146, providing that an appeal may be taken (Subdivision 1) from all final judgments (Subdivision 2), from orders granting or refusing new trials, orders in extraordinary proceedings, interlocutory orders, and special orders after judgment, and (Subdivision 3) from judgments or orders in probate proceedings, appeals from judgments and orders in probate proceedings are only allowable under Subdivision 3, except in the granting or refusing a new trial, which may be taken under Subdivision 2.—*Id.*

Appeal From an Order Directing an Executor to Execute a Lease.

19. Under Code of Civil Procedure 1899, Section 1722, as amended by Sess. Laws 1899, p. 146, an order of the district court directing an executor to execute a lease of certain realty belonging to his testator's estate, is not a "final judgment in a special proceeding" from which an appeal will lie. (*In re McFarland's Estate*, 10 Mont. 446, and *In re Higgins' Estate*, 15 Mont. 475, distinguished.)—*Id.*

Appeal From an Order Directing the Execution of a Lease of Realty.

20. Under Code of Civil Procedure, Section 1722, Subdivision 3, as amended by Sess. Laws 1899, p. 146, providing that appeals may be taken from orders directing a conveyance of realty in probate proceedings, an appeal will not lie from an order directing the execution of a lease of realty, as "conveyance," as used in the statute, does not include a lease.—*Id.*

New Trial—Conflict of Evidence—Discretion of Trial Court.

21. The Supreme Court will not disturb the discretion of the trial court in granting a new trial, on the ground that the evidence was insufficient to sustain the verdict, where the record discloses a substantial conflict as to material matters.—*O'Rourke v. Sherman*, 310.

Undertaking On Appeal—Void for Ambiguity.

22. A court granted, first, a restraining order, then an order continuing in force the restraining order and directing an injunction *pe dente lite* to issue, and afterwards entered another order making the restraining order absolute and directing that the defendants be enjoined until further order: and defendants filed notice of appeal "from the order continuing the restraining order issued therein in force, and from the order granting an injunction against defendants pending the final determination of this action, and from the injunction order granted herein," and the undertaking on appeal, which was in the sum of \$300, recited that, "whereas defendants have taken an appeal from the orders in said cause continuing a restraining order in force, granting a temporary injunction, and from said order of temporary injunction," and the defendants in their brief on appeal assigned the orders as separate errors. Held, that the appeal should be dismissed, as said undertaking was void on account of ambiguity, because it could not be referred to either of the orders from which the appeal was sought, although one of said orders was not appealable. (*Follwoing Creek v. Bozeman Water Works Co.*, 22 Mont. 327; and *Murphy v. Northern Pac. Ry. Co.*, 22 Mont. 577.)—*Washoe Copper Co. v. Hickey*, 319.

Strict Compliance With Statute Required.

23. The statute providing for appeals must be strictly complied with.—*Id.*

Jurisdiction of Appeal—Failure to File Proper Undertaking.

24. The Supreme Court has no jurisdiction to entertain the appeal, where the appellant fails to file a proper undertaking on appeal.—*Id.*

Record On Appeal—Certificate of Clerk—Void Undertaking.

25. Where a record on appeal contains a certificate of the trial court's clerk, as required by Code of Civil Procedure, Section 1739, providing that such clerk shall certify that "an undertaking in due form has been properly filed," an undertaking may

be shown to be void for uncertainty by filing a certified copy of the same in the Supreme Court, where such copy does not tend to contradict the record as to any matter of fact.—*Id.*

Denial of Motion for a New Trial—Presumption.

26. The trial court is presumed to have acted legally in denying motion for a new trial, and to have based on a proper foundation its decision that the evidence was sufficient to sustain the conviction.—*State v. Sheppard*, 323.

Insufficiency of the Evidence—Burden On Appellant—Presumption.

27. An appellant, relying on the insufficiency of the evidence, must show by the record affirmatively all material facts, or the substance thereof, so as to overcome the presumption of favor of the court below.—*Id.*

Insufficiency of the Evidence—Entire Evidence Must Be in Bill of Exceptions.

28. On an appeal for insufficiency of the evidence to convict, the entire evidence which is material, or its substance, should be before the appellate court in the bill of exceptions.—*Id.*

Insufficiency of the Evidence—Entire Evidence—Certificate of Trial Judge.

29. On an appeal for insufficiency of the evidence to justify the verdict, the appellate court will not examine the evidence to test its sufficiency, unless the fact that the bill of exceptions contains all the evidence, or the substance thereof, be certified to by the trial judge, or the bill itself clearly shows such to be the fact.—*Id.*

Transcript—Certificate of Stenographer.

30. The certificate of the stenographer, who transcribed his notes for an appeal, that the transcript contains all the evidence, cannot supply the certificate of the judge to that effect, or an omission of the bill of exceptions itself to show that it does.—*Id.*

"Statement On Appeal."

31. Since July 1, 1895, the statutes of Montana no longer recognize a "Statement on Appeal."—*Harding v. McLaughlin*, 334.

Nonsuit—Bill of Exceptions.

32. Error in granting a nonsuit cannot be considered on appeal, when there is no bill of exceptions.—*Id.*

Undertaking on Appeal—Void for Ambiguity.

33. A single undertaking in the sum of \$300 to secure two appeals from two separate orders made at different times after judgment is void for ambiguity, justifying a dismissal of both appeals.—*Grage v. Paulson*, 387.

Inconsistent Instructions—Criminal Law.

34. Where instructions on a material point in a criminal case are inconsistent, some correct and others incorrect, a conviction will be reversed.—*State v. Peel*, 353.

Water Right—Abandonment—Defective Finding.

35. A defective finding of an abandonment of a water right, in an injunction suit, is not on appeal ground for reversal of the judgment when the losing party has failed to follow Section 1114 *et seq.* of the Code of Civil Procedure.—*Haggin v. Saille*, 375.

Equity—Findings of a Jury—Instructions.

36. Since findings of a jury in an equity suit are advisory merely, a judgment will not be reversed on appeal for the giving of erroneous instructions, where the court, in making its findings of fact, approved some of those found by the jury, and made other findings, all the findings of the court being supported by the evidence.—*Id.*

Former Appeal—Law of the Case.

37. Held, that a question presented in this appeal was passed upon indirectly in a

former appeal in the same case, and that said former decision is now the law of the case as to said question, and binding on the court.—*Murray v. Poiglaase*, 401.

Finding—Evidence to Justify.

38. Where the trial court found the issues generally in favor of defendant, and there was evidence to justify the finding, it will not be disturbed on appeal.—*Noyes v. Ross*, 425.

Exclusion of Evidence—Exception—Review.

39. Exclusion of evidence will not be reviewed, in the absence of an exception taken to the ruling.—*State v. Pepo*, 473.

Homicide—Circumstantial Evidence.

40. Circumstantial evidence reviewed and, *held*, sufficient to sustain a verdict of murder in the first degree.—*Id.*

Homicide—Evidence Reviewed.

41. Evidence reviewed and, *held*, to justify a verdict of guilt of murder.—*State v. Hurst*, 484.

Invading Province of Trial Court.

42. The appellate court cannot try a case *de novo*, and thus invade the province of the trial court by passing upon disputed questions of fact and the credibility of witnesses.—*Id.*

Refusal to Grant a New Trial—Conflict of Evidence.

43. Refusal to grant a new trial of a criminal case for insufficiency of evidence will not be disturbed on appeal where the evidence was conflicting, and tended to support the verdict.—*Id.*

Improper Statements of Counsel in Argument—Bill of Exceptions.

44. On appeal, alleged objectionable statements of counsel in argument cannot be considered, nor the action of the trial court thereon be reviewed, unless they, and the ruling of the court thereon, are preserved in a bill of exceptions and properly certified.—*Id.*

Motion to Set Aside Information.

45. Under Penal Code, Section 1910, providing that an information may be set aside when not properly subscribed by the county attorney, and Section 1911, providing that, unless a motion to set aside be made before demurrer or plea, this ground of objection is waived, if the motion to set aside the information was made in the trial court, and improperly refused, the error can be reviewed only on appeal from the judgment; it cannot be reviewed on an appeal from an order granting a new trial, not being one of the grounds for new trial enumerated under Penal Code, Section 2192.—*State v. Schnepel*, 523.

New Trial—Review—Discretion of Trial Court.

46. The rule that the trial court's action in granting a new trial cannot be disturbed, even if it committed errors during the course of the trial, because such action was discretionary, applies only when the motion is made upon grounds which appeal to the discretionary power of the court, hence does not apply where the motion was made upon assignments of errors in law only.—*Id.*

Giving Requested Instructions—Error.

47. Defendant cannot predicate error on the giving of an instruction which he requested.—*State v. McClellan et al.*, 532.

ASSIGNMENT IN FAVOR OF CREDITORS.

Chattel Mortgage.

Where defendants gave a mortgage on all their property, which consisted of a stock of goods, they retaining possession and intending to continue the business, and having given the mortgage as a lien only, without intending to convey title or right to immediate possession, such mortgage will not operate as an assignment in favor of the mortgagee as a creditor.—*Noyes v. Ross*, 425.

ATTORNEY.

As to improper statements of counsel in argument, see *APPEAL*, 44.

Disbarment—Accusation by Private Person.

1. Where an accusation preferred by a private person in a disbarment proceeding, is for a cause named in Code of Civil Procedure, Section 402, Subdivision 5, providing that an attorney and counselor who is guilty of deceit, malpractice, crime, or misdemeanor arising after his admission to practice, may be removed or suspended, an objection that such accusation is preferred by a person not authorized by law to inform the court of the matters therein charged, is without merit.—*In re Wellcome*, 140.

Disbarment Proceedings—Practice.

2. Proceedings under the fifth subdivision of Section 402 of the Code of Civil Procedure, may be instituted and maintained in the same manner as may those brought under the other subdivisions of said section.—*Id.*

Disbarment Proceedings—Pleading.

3. Charges in an accusation against an attorney, in disbarment proceedings, which are indefinite, vague, as well as uncertain, will, on motion, be stricken out.—*Id.*

Disbarment Proceedings—Jurisdiction.

4. Under Code of Civil Procedure, Section 402, Subdivision 5, providing that an attorney who is guilty of any deceit, malpractice, crime, or misdemeanor arising after his admission to practice, may be removed or suspended, the jurisdiction of the court is not confined to crimes or misdemeanors committed by an attorney while acting in his official capacity.—*Id.*

Disbarment—Bribery and Conspiracy.

5. *Obiter*: Bribery and conspiracy are heinous crimes involving moral turpitude, and the perpetration thereof by an attorney proves his unfitness to practice the honorable profession of the law.—*Id.*

Disbarment Proceedings in Advance of Criminal Prosecution.

6. Under Code of Civil Procedure, Section 402, Subdivision 5, providing that an attorney and counselor who is guilty of any deceit, malpractice, crime, or misdemeanor arising after his admission to practice, may be removed or suspended, it is discretionary with the court whether it will exercise its jurisdiction to remove or suspend an attorney in such cases, and, where the accused is charged with bribery and conspiracy, the court will refuse to inquire into the truth of the charges, unless cogent reasons be furnished by the accusation, or by a showing in support of it, why jurisdiction should be entertained in advance of a criminal prosecution and conviction.—*Id.*

Disbarment—Materiality of Evidence As to Failure of Criminal Prosecution.

7. In disbarment proceedings grounded on an alleged bribery, an affidavit stating the existence of prejudice in favor of the accused in the county where criminal proceedings were attempted against him is immaterial, when it does not state that the failure of the criminal proceedings was due to this prejudice.—*In re Wellcome*, 218.

Disbarment—Act Done in Private, Not Official Capacity.

8. Where evidence tends to show that an attorney has been guilty of bribing a legislator, it is sufficient to justify disbarment proceedings, although the act was done in his private, not in his official, capacity.—*Id.*

Disbarment—Bribery of Members of the Legislature.

9. *Obiter*: A lawyer who is guilty of willful bribery of members of the legislature is unworthy of the honors and responsibilities accompanying the office of an attorney and counselor at law.—*Id.*

Disbarment—Sufficiency of Attempt at Criminal Prosecution.

10. In disbarment proceedings based on alleged bribery of a legislator, it appeared that a grand jury had been called to investigate the bribery by the accused; that they had examined witnesses, and failed to find an indictment; that thereupon the attorney general stated to the court that there were grounds for indictment, and asked for another grand jury, which was refused. No further criminal proceedings were instituted. *Held*, that this attempt at criminal prosecution was sufficient to justify the investigation of the charges by the Supreme Court as grounds for disbarment.—*Id.*

Disbarment—Sufficiency of Attempt at Criminal Prosecution.

11. It is not necessary that, as a condition precedent to the exercise of the jurisdiction of the Supreme Court in a disbarment proceeding, repeated efforts be made to secure an indictment for crime, or that unusual and extraordinary procedure be invoked under the Criminal Code; it is sufficient to justify the institution of disbarment proceedings in the Supreme Court, if the ordinary and usual forms of the criminal practice and procedure have been pursued.—*Id.*

Disbarment—Verification of Accusation.

12. Under Code of Civil Procedure, Section 420, providing that an accusation must be verified by an oath that the charges therein are true, an accusation in disbarment proceedings wherein some of the charges are verified only on information and belief, and others are positively sworn to, is partially valid, and will stand against an objection aimed at the entire accusation.—*Id.*

Disbarment Proceeding Is Not a Criminal Prosecution.

13. A disbarment proceeding is not a criminal prosecution, nor an aid to a criminal investigation.—*Id.*

Disbarment Proceedings—Right of Accused to Meet the Witnesses Against Him Face to Face.

14. A disbarment proceeding is not a criminal prosecution, so as to entitle the respondent to be confronted personally by the witnesses against him, under Constitution, Article III, Section 16, providing that a person accused of a crime shall have the right to meet the witnesses against him face to face.—*In re Wellcome*, 259.

Disbarment Proceedings—Deposition of Witness Out of the State.

15. Under Code of Civil Procedure, Section 3341, which provides that the testimony of a witness out of the state may be taken in a special proceeding at any time after a question of fact has arisen, a deposition may be taken in disbarment proceedings.—*Id.*

Disbarment Proceedings—Failure of Accused to Testify.

16. A proceeding for disbarment is not a criminal prosecution, nor in aid of criminal investigation, and Penal Code, Section 2442, providing that the failure of the accused to testify in his own behalf shall not be used to his prejudice, has no application to such proceeding.—*In re Wellcome*, 450.

Disbarment Proceedings—Presumption of Innocence.

17. In disbarment proceedings, where the accused did not testify in his own behalf the presumption of his innocence remains with him only until it appears to the court with reasonable certainty that he is guilty, and then it is incumbent upon him to speak.—*Id.*

Disbarment Proceedings—Reasonable Doubt.

18. The rule in criminal prosecutions that the guilt of the accused must be proved beyond a reasonable doubt does not apply to proceedings for disbarment.—*Id.*

Disbarment Proceedings—Witnesses—Impeachment.

19. The testimony of two witnesses to acts by the accused constituting bribery is not impeached by that of six witnesses from the localities where the two live, to the effect that they bear a bad reputation for truth, when the six are the political opponents of the two, and some of them had had personal differences with the two, and others testified that they had a good opinion of the two until they testified to the bribery.—*Id.*

Disbarment Proceedings—Evidence Sufficient to Establish Guilt.

20. The testimony of two credible witnesses to acts by the accused constituting bribery was a relation involving much detail and many incidents, and was given by both on three separate occasions without material variation, and was corroborated by the production by one of them of a large sum of money which they claimed to have received as a bribe from the accused, and the witness producing the money was a man of small means. The accused failed, without reason, to testify in his own behalf, and his attorneys answered on information and belief only. *Held*, there being no evidence to the contrary, that the evidence given was sufficient to establish the guilt of accused.—*Id.*

Disbarment Proceedings—Good Character of Accused.

21. That the accused had always borne an excellent reputation for integrity is in his favor during trial, but is no defense to the crime if actually committed.—*Id.*

Disbarment Proceedings—Witness—Credibility.

22. That the principal witness in disbarment proceedings against the accused was a brother lawyer, and secured his evidence in a reprehensible manner, by acting as detective, and apparently entering into a criminal plan with the accused, in order to expose him, does not, of itself, render his evidence unworthy of belief.—*Id.*

Disbarment Proceedings—Quantum of Proof Necessary.

23. Under the Montana statute, offenses within the line of professional duties and those without these lines, stand upon the same footing so far as concerns the quantum of proof necessary to establish them.—*Id.*

BANKS AND BANKING.**Cashier—Loan of Bank Funds—Public Policy.**

1. Courts will not, as a matter of public policy, enforce a release of a liability of a cashier of a bank, obtained by him in consideration of a loan to the promisor of funds of the bank.—*Northwestern Nat'l Bank v. Great Falls Opera House Co.*, 1.

Cashier—Loan of Bank Funds—Consideration for Release.

2. An agreement to release a cashier of a bank from a personal obligation, based upon an agreement by him to loan the promisor bank funds is without consideration.—*Id.*

BILL OF EXCEPTIONS.**Application to Supreme Court for Leave to Prove Exceptions.**

1. Neither Code of Civil Procedure, Sec. 1157, nor Supreme Court Rule IV, Subdi-

vision 14, has reference to the action of a judge refusing to settle any bill or statement whatever upon the ground of unreasonable delay in seeking settlement.—*In re Application of Prune*, 41.

Petition in the Supreme Court for Leave to Prove Exceptions—Dismissal.

2. An original petition in the Supreme Court for leave to prove exceptions, under Sec. 1157 of the Code of Civil Procedure and the Rules of the Supreme Court,—the ground of the application being that certain amendments, not in accord with the facts, were allowed by the trial judge to the bill of exceptions as served—will be dismissed, where the amendments allowed are immaterial.—*Forrester & MacGinniss v. Boston & Mont. Consol. C. & S. M. Co.*, 122.

Including in Bill an Order Deemed Excepted to.

3. *Obiter*: There is no necessity of including in a bill of exceptions an order appealed from, which merely denied a motion to vacate the appointment of a receiver; such order is deemed excepted to, and may be presented as part of the record proper by a copy certified as correct by the clerk.—*Id.*

Settlement—Immaterial Amendments.

4. A bill of exceptions, as presented for settlement, contained a copy of the order appealed from, which merely denied the motion to vacate the appointment of a receiver. The amendment to the bill, proposed and allowed, set out that the court refused to grant the motion to discharge the receiver because defendants had refused to comply with the order appointing the receiver, and had violated it, and stood charged with contempt of court, to which the judge directed to be added a statement corroborating such alleged facts. No such reasons were announced, either by express words or by implication, at the time the order was made. *Held*, that the reasons for the refusal of the order were immaterial, since the court, having "heard" the motion involving substantial rights, could not punish for contempt by deciding against the movants, and hence the Supreme Court cannot strike out such amendments from the bill, under Code of Civil Procedure, Sec. 1157, though it may disregard them.—*Id.*

On Appeal for Insufficiency of the Evidence.

5. On an appeal for insufficiency of the evidence to convict, the entire evidence which is material, or its substance, should be before the appellate court in the bill of exceptions.—*State v. Sheppard*, 323.

On Appeal for Insufficiency of the Evidence—Certificate of Trial Judge.

6. On an appeal for insufficiency of the evidence to justify the verdict, the appellate court will not examine the evidence to test its sufficiency, unless the fact that the bill of exceptions contains all the evidence, or the substance thereof, be certified to by the trial judge, or the bill itself clearly shows such to be the fact.—*Id.*

Certificate of Stenographer—Certificate of the Judge.

7. The certificate of the stenographer, who transcribed his notes for an appeal, that the transcript contains all the evidence, cannot supply the certificate of the judge to that effect, or an omission of the bill of exceptions itself to show that it does.—*Id.*

"Statement On Appeal."

8. Since July 1, 1896, the statutes of Montana no longer recognize a "Statement on Appeal."—*Harding v. McLaughlin*, 334.

Application to Supreme Court for Leave to Prove Exceptions.

9. Under Code of Civil Procedure, Section 1157, and Supreme Court Rule IV., Subdivision 14, allowing a bill of exceptions to be proved before a referee, by leave of the Supreme Court, when the trial judge refuses to settle it in accordance with the facts, and requiring the bill, when proved, to be certified by the chief justice as correct, etc., a bill proved before a referee on leave granted, but not certified to as correct, will be disregarded.—*Id.*

Application to Supreme Court for Leave to Prove Exceptions.

10. Under Code of Civil Procedure, Section 1157, and Supreme Court Rule IV., Subdivision 14, allowing a bill of exceptions to be proved before a referee, by leave of the Supreme Court, when the trial judge refuses to settle it, a bill proved before a referee will be disregarded when his report fails to show that the judge's refusal to settle it because of delay in serving it was not justified.—*Id.*

Application to Supreme Court for Leave to Prove Exceptions.

11. The remedy given by Code of Civil Procedure, Section 1157, and Supreme Court Rule IV., Subdivision 14, allowing a bill of exceptions to be proved before a referee, by leave of the Supreme Court, when the trial judge refuses to settle it in accordance with the facts, does not apply to a mere refusal of the judge to settle any bill whatsoever.—*Id.*

Improper Statements of Counsel in Argument.

12. On appeal, alleged objectionable statements of counsel in argument cannot be considered, nor the action of the trial court thereon be reviewed, unless they, and the ruling of the court thereon, are preserved in a bill of exceptions and properly certified.—*State v. Hurst*, 484.

BRIEFS.

See RULES OF THE SUPREME COURT.

BURDEN OF PROOF.

See ATTORNEY, 17.

CRIMINAL LAW, 8, 17, 81, 36, 44.

INSTRUCTIONS, 7, 9.

CHATTEL MORTGAGES.

See PRINCIPAL AND AGENT.

Affidavit of Good Faith.

1. A statement, signed by all the parties to a chattel mortgage, but the jurat of which does not bear the signature or seal of the officer before whom it was sworn to, is not a sufficient compliance with Civil Code, Sec. 3881, providing that chattel mortgages shall be void unless accompanied by an affidavit of all the parties thereto, or their agents or attorneys in fact, stating that the mortgage was made in good faith, and without any design to hinder, delay, or defraud creditors.

Semble. In an affidavit of good faith, the several words "hinder," "delay," and "defraud," are essential to the validity of the mortgage.—*Reynolds v. Fitzpatrick*, 52.

Verbal Mortgage.

2. A verbal mortgage of chattels is as binding between the parties thereto as it would be if expressed in writing.—*Id.*

Sale of Mortgaged Property—Possession.

3. R. sold personal property to C., and took a mortgage for the purchase price. After C. had paid a part of the purchase price, he, with the consent of R., sold his interest in the property to H., who agreed to pay R. the balance of the price agreed by C. to be paid to R. *Held*, that it was not necessary that R. should have possession to convey title to H.—*Id.*

Conversion of Mortgaged Property.

4. A mortgagee can maintain an action of conversion against one who takes the mortgaged property from his mortgagor after default in the conditions of the mortgage, where the mortgage provides that the mortgagee shall be entitled to possession on default in the conditions of the mortgage.—*Id.*

Action for Conversion by Mortgagee.—Nonsuit.

5. In an action for conversion it appeared that plaintiff sold certain personal property, and took a mortgage to secure payment, and, after the mortgagors had paid a part of the price, they, with the consent of the mortgagee, sold their interest to another, who orally agreed to pay the mortgagee the balance due, and accept the property subject to the terms of the mortgage. The mortgage was void as to creditors of the mortgagor, because not accompanied by an affidavit of good faith. The property was delivered by the mortgagors to the second purchasers, and it was thereafter levied upon by defendants in a suit by creditors of the former. The mortgage, by its terms, provided that the mortgagee should be entitled to the immediate possession of the property if attached by creditors of the mortgagor. *Held*, that it was error to grant defendant a nonsuit on the ground that plaintiff had no title or right to possession which would support conversion.—*Id.*

Transactions in Fraud of Creditors.

6. Defendants, after contracting a debt to plaintiffs, executed a chattel mortgage to a third party on all their property, consisting of a stock of goods, the consideration for which was a previous loan, with which the mortgagors had purchased part of the goods. A further consideration were certain debts assumed by the mortgagee. The value of the goods was only a reasonable security for this combined debt. The mortgagors were to remain in possession, and sell at retail in the usual way of business for cash, or on not to exceed 30 days' credit, and to account to the mortgagee for the proceeds of the sales, and one of them was to be allowed to retain living expenses from the proceeds. The balance, after deduction of costs, was to go to the mortgagee. The mortgagee, in fear of losing the security, made a sale of the property by public auction prior to the maturity of the debt. *Held*, that the transactions were not in fraud of creditors.—*Noyes v. Ross*, 425.

Fraud—Relationship of Mortgagee and Mortgagor.

7. A chattel mortgage otherwise valid is not fraudulent because of relationship between the mortgagee and one of the mortgagors.—*Id.*

Partnership Property—Firm Creditors.

8. The right to have partnership property first applied to partnership debts is one primarily for the benefit of the partners, and if they waive such right, firm creditors cannot invoke it to secure preferences over mortgage creditors.—*Id.*

Mortgagor in Possession—Fraud.

9. The fact that a chattel mortgagor in possession is allowed to draw \$100 per month from the proceeds of sales, is not of itself conclusive of fraud.—*Id.*

Chattel Mortgage—Assignment in Favor of Mortgagee.

10. Where defendants gave a mortgage on all their property, which consisted of a stock of goods, they retaining possession and intending to continue the business, and having given the mortgage as a lien only, without intending to convey title or right to immediate possession, such mortgage will not operate as an assignment in favor of the mortgagee as a creditor.—*Id.*

Mortgagor Retaining Possession.

11. A chattel mortgage which authorizes the mortgagor to retain possession, with the right to sell the stock of goods mortgaged in the ordinary and usual course of trade, if otherwise good, is valid, provided it appears therein that such sales are to be for the benefit of the mortgagee, and the mortgagor is to account to the mortgagee for the proceeds of the sales.—*Id.*

Good Faith—Question of Law and Fact.

12. The question of the good faith of a chattel mortgage transaction is not to be decided as one entirely of law, but is largely one of fact.—*Id.*

Mortgagor Retaining Possession—Living Expenses.

13. A chattel mortgage is not on its face invalid because it authorizes one of the mortgagors in possession to retain his actual and necessary living expenses out of the proceeds of the mortgaged personality.—*Id.*

Mortgagor Retaining Possession—Sales on Credit.

14. A provision in a chattel mortgage giving authority to a mortgagor in possession "to sell at retail to regular and other customers in the usual and general way of business for cash, or on not to exceed 30 days' credit to responsible parties," does not, *per se*, render the mortgage void,—where the mortgage provides for accurate accounts of all sales, and that collections and deposits be applied towards the payment of the debt, less necessary and actual expenses of conducting the business.—*Id.*

Sale of Mortgaged Property by Mortgagee.

15. An unauthorized sale of mortgaged property by the mortgagee before maturity of the mortgage debt, the mortgage being valid, and the mortgagor acquiescing in the sale, is not invalid as to creditors who had no lien on the property.—*Id.*

CODES.

See STATUTES.

CONSTITUTION.**List of Sections Cited or Commented Upon.**

Article III, Section 16.....	239
Article IV, Section 1.....	48
Article V, Section 23.....	117, 500
Article V, Section 25.....	117
Article V, Section 28.....	139
Article V, Section 30.....	48, 50
Article V, Section 31.....	252, 256-258
Article VIII, Section 11.....	308
Article VIII, Section 23.....	40
Article XII, Section 1.....	562
Article XII, Section 16.....	562
Article XII, Section 18.....	562
Article XVI, Section 5.....	252
Schedule, Section 4.....	308

Qualifications of Mayors and Aldermen—Statutes—Expression of Subject in Title.

1. The act of March 7, 1896, entitled "An act to amend Sections 384 and 385 of the Fifth Division of the Compiled Statutes of Montana, and the amendments thereto, approved September 14, 1887," relating to the qualifications of mayors and aldermen and declaring the same, does not conflict with Constitution, Art. 5, Section 23, declaring that an act shall not embrace more than one subject, which shall be clearly expressed in its title.—*Dowty v. Pittwood*, 118.

Statutes—Revising, Amending, etc., Any Law.

2. The act does not violate Constitution, Art. 5, Section 25, providing that no law shall be revised, amended or extended by reference to its title only; but so much as is revised, amended or extended shall be re-enacted and published at length.—*Id.*

Law Increasing or Diminishing the Salary of a Public Officer.

3. The constitutional provision (Sec. 31, Art. V) prohibiting any law increasing or diminishing the salary or emoluments of a public officer after his election or appointment, does not forbid the legislative assembly imposing upon a public officer addi-

tional duties, and (in the absence of a salary designed to cover such services), at the same time allowing him compensation for the performance of such new duties.—*State ex rel. Donyes v. Board of County Commissioners*, 250.

County Surveyor—Compensation.

4. Appellant was, in November, 1898, elected county surveyor for the term of two years. The legislative assembly, by an act approved March 4, 1897, abolished the office of road supervisor, and imposed the duties of that office upon the county surveyor, and at the same time allowed him compensation for the discharge of such additional duties. On March 3, 1899, the legislative assembly, by an act, repealed the act of March 4, 1897, and re-established the office of road supervisor and stripped appellant of the duties imposed, and deprived him of the compensation allowed therefor, by the act of March 4, 1897. *Held*, that the act of March 3, 1899, does not, as applied to appellant, violate Section 31, Article V., of the Constitution.—*Id.*

County Surveyor—Compensation.

5. The legislative assembly is not prohibited by Section 31, Article V., of the Constitution, from adding duties and providing compensation for them affecting a county surveyor then in office, and thereafter taking away such duties and attendant emoluments from a subsequent surveyor elected before such last act of the legislature was passed.—*Id.*

Public Officer—Act Increasing or Diminishing Compensation.

6. Where an officer is paid by fees or per diem compensation measured by the services performed and the time employed, his emoluments are not, within the meaning of Section 31, of Article V., of the Constitution, diminished by a statute, taking effect after his election, which relieves him of the obligation to perform the duties resting upon him, and destroys the compensation which had theretofore been prescribed for their discharge.—*Id.*

Statutes—Expression of Subject in Title.

7. By Section 23, Article V., of the Constitution, it is only intended that the subject of a bill shall be fairly expressed in the title; it is not necessary that a title shall embody the exact limitations or qualifications contained in the bill itself which are germane to the purpose of the legislature, if the general subject of the measure is clearly expressed in the title.—*State v. Anaconda Copper Mining Co.*, 498.

Statutes—Expression of Subject in Title.

8. Laws of 1897, p. 245, entitled "An act to amend Section 705, of Title X., of the Penal Code of the State of Montana, to have the cages in all mines cased in," makes it unlawful for any corporation to sink or work through any vertical shaft where mining cages are used to a greater depth than 300 feet, unless such shaft shall be provided with an iron-bonneted safety cage. *Held*, that the subject-matter of the act is sufficiently expressed in the title, within the meaning of Constitution Article V., Section 23.—*Id.*

CONSTRUCTION.

See CONTRACTS.

For construction of statutes, See STATUTORY CONSTRUCTION.

"And" Read "Or."

1. The laws of a mutual benefit society provided, that when a death claim "shall be rejected by the grand master workman and finance committee of this grand lodge," the claimant must, before taking any other proceeding, demand a hearing, and submit his claim for consideration of the board of arbitration. *Held*, that, in view of other provisions of the law referred to in the opinion, the copulative "and" between "grand master workman" and "finance committee" should be read as if it were the disjunctive "or" and that the rejection of a claim by either the grand master workman or by the finance committee is effectual, and that the grand master workman

has nothing whatever to do in the matter of approving or disapproving a death claim when the finance committee has rejected it; it is only when the finance committee approves a claim that the power to reject is confided to the grand master workman.
—*Cotter v. Grand Lodge, A. O. U. W.*, 82.

Notice of Location of Mining Claim.

2. Courts always construe a notice of location of a mining claim liberally.—*Bramlett v. Flick*, 95.

Mining Lease—"Net Proceeds."

3. The lessees of a mine agreed with plaintiff's assignor to operate the mine, in consideration of plaintiff's assignor furnishing all necessary supplies, the net proceeds of the ore, after milling, to be equally divided between the lessees and plaintiff's assignor. *Held*, that in determining the net proceeds only the cost of smelting, and not the costs of mining, hoisting and handling the ore, should be deducted from the gross proceeds.—*Yank v. Bordeaux*, 205.

CONTEMPT.

Bill of Exceptions—Amendment—Court Cannot Punish for Contempt by Deciding a Matter Against a Party.

1. A bill of exceptions, as presented for settlement, contained a copy of the order appealed from, which merely denied the motion to vacate the appointment of a receiver. The amendment to the bill, proposed and allowed, set out that the court refused to grant the motion to discharge the receiver because defendants had refused to comply with the order appointing the receiver, and had violated it, and stood charged with contempt of court, to which the judge directed to be added a statement corroborating such alleged facts. No such reasons were announced, either by express words or by implication, at the time the order was made. *Held*, that the reasons for the refusal of the order were immaterial, since the court, having "heard" the motion involving substantial rights, could not punish for contempt by deciding against the movants, and hence the Supreme Court cannot strike out such amendments from the bill, under Code of Civil Procedure, Sec. 1187, though it may disregard them.—*Forrester & MacGinnis v. Boston & Mont. C. & S. M. Co.*, 122.

Mandamus to Trial Judge to Hear and Determine an Application.

2. A writ of mandate will not issue to a trial judge, commanding him to hear and determine an application to vacate an order appointing a receiver, where he makes it appear to the Supreme Court by his return that the movants are in contempt.—*Id.*

Mandamus—Disobedience of Writ.

3. Where a court has jurisdiction of an application for *mandamus*, and authority to determine all questions presented by the application, the fact that it granted the relator more comprehensive relief than was warranted by the application is not a defense in contempt proceedings for failure to obey the mandate,—at least, so far as it related to matters contemplated by the application.—*State ex rel. Coad v. Judge, etc.*, 171.

CONTRACTS.

Validity—Consideration.

1. An agreement to release a cashier of a bank from a personal obligation, based upon an agreement by him to loan the promisor bank funds, is without consideration.—*Northwestern Nat'l Bank v. Great Falls Opera House Co.*, 1.

Contract With City—Interpretation.

2. Under a contract by a city with a water company by which the latter has to furnish and keep in working order 15 fire hydrants for a period of 10 years at a rental of \$112 per annum, the city to have the right at any time within 10 years "to take any additional number of fire hydrants at the annual rental of one hundred dollars each,"

the city, ordering additional hydrants, is liable for their rent for the remainder of the period of ten years, and not merely until the order is rescinded.—*State ex rel. Kaiser Water Co. v. City of Phillipsburg*, 18.

Illegal Contract—Defense.

3. That an alderman made an illegal contract with a city to construct a sewer is no defense to his contract to indemnify a third person for his payment of debts incurred in its construction, and expenses in excess of the stipulated price in completing the sewer according to contract.—*Gallagher v. Cornelius*, 27.

Contracts Ousting Jurisdiction of Courts.

4. Civil Code, 1895, Section 2245, making void provisions of contracts by which the jurisdiction of courts over controversies thereunder is ousted, does not apply to contracts made before its adoption.—*Cotter v. Grand Lodge, A. O. U. W.*, 82.

Contracts Ousting Jurisdiction of Courts.

5. The common law doctrine, that a provision in an ordinary contract requiring all differences between the parties touching their rights and liabilities thereunder to be submitted to arbiters, whose decision shall be conclusive and final, will not be allowed to bar the litigation of such differences in the courts, is an anomaly, and inconsistent with the right freely to contract, and its operation should not be extended by construction, nor should it ever be invoked to nullify or impair contractual provisions not clearly infected with the supposed evils intended to be cured or prevented.—*Id.*

Contract With County—Lowest Responsible Bidder, Etc.

6. Session Laws of 1897, page 48, Section 12, provided that the commissioners of B. county should contract with the lowest responsible bidders for transcribing and indexing certain records. The board, without advertising for bids or any notice of its intention to let a contract, entered into an agreement with relators, whereby they agreed to do the indexing at a stipulated wage per month. Held, that the contract was void for want of compliance with the law, in that the county commissioners disregarded its requirements, both in failing to let the contract to the lowest bidder and in severing the work to be done and letting it under separate contracts to different parties.—*State ex rel. Lambert v. Coad*, 131.

Building Contract—Conditions Precedent to Right of Payment.

7. Under a building contract providing that final payment should be made only upon the production of satisfactory proof that there were no claims or liens against the building, the performance of the condition is precedent to the right of payment.—*Franklin v. Schultz*, 185.

Building Contract—Substantial Performance.

8. There is not a substantial performance of a building contract entitling the builder to recovery of the final payment, where there was a failure to plaster a portion of the house and build a flue provided for in the contract.—*Id.*

Building Contract—Waiver of Defects and Acceptance.

9. That the owner of a newly constructed building refusing to accept the same because not completed according to contract moves into the building will not operate as a waiver of defects and acceptance.—*Id.*

Building Contract—Waiver of Defects and Acceptance—Intention.

10. An intention to waive defects in the construction of a building, and accept same as a compliance with the contract by payment of a portion of the final installment on the contract, will not be inferred, where it is not shown that payment was made with knowledge of the defects.—*Id.*

Forfeitures—Public Policy.

11. Forfeitures of contracts not immoral or against public policy are not to be declared unless the law under which the forfeitures are claimed is so clear and direct

in language that it admits of but one construction by which the contract sued upon must be adjudged void and unenforceable.—*Manhattan Trust Co. v. Davis*, 272.

Assignment Pendente Lite—Action—Abatement and Revival.

12. Where a contract provided that, if the purchaser of property should become dissatisfied, she should be entitled to a return of the purchase price on surrender of the property sold, the fact that pending the suit to enforce such agreement she assigned the contract is immaterial, since Code of Civil Procedure, Section 22 (Compiled Statutes 1887), authorizes the continuance of a suit in the name of the original party, or substitution of the transferee, where plaintiff's claim is transferred *pendente lite*.—*O'Rourke v. Schultz*, 235.

Assignment Pendente Lite—Waiver of Objection.

13. Where, in an action on a contract, it appeared that plaintiff's interest had been assigned to another *pendente lite*, and defendant made no objection to such assignment in that action, he cannot subsequently object thereto in a proceeding to restrain the enforcement of the judgment recovered.—*Id.*

Conditional Judgment for Rescission—Injunction.

14. Where, after a judgment for the rescission of a contract on plaintiff's surrender of property received thereunder, it appears that she was unable to make such surrender, defendant is entitled to restrain the enforcement of the judgment.—*Id.*

Rescission—Tender of Shares of Corporate Stock.

15. A contract provided that, if the purchaser of a one-fourth interest in brick works should become dissatisfied with the purchase, she should be entitled to a return of the purchase price on surrender of the property sold. Subsequently, by agreement of both parties, her interest was transferred to a corporation, and 2,500 shares of its stock received, as representing the property. After the purchaser had sued to rescind the contract, she assigned it, and her assignee tendered the vendor 2,500 shares, to which she was legally entitled as against the corporation. *Held*, that such tender was valid, notwithstanding alleged irregularities in the issuance of the certificate representing the stock.—*Id.*

Contract—Lease.

16. In an action to recover a judgment for damages occasioned by the breach of a certain contract: *Held*, that the particular contract upon which the action was based was not a lease.—*Bandmann v. Davis*, 382.

CONVERSION.

Action by Mortgagee—Right of Possession.

1. A mortgagee can maintain an action of conversion against one who takes the mortgaged property from his mortgagor after default in the conditions of the mortgage, where the mortgage provides that the mortgagee shall be entitled to possession on default in the conditions of the mortgage.—*Reynolds v. Fitzpatrick*, 52.

Action by Mortgagee—Nonsuit.

2. In an action for conversion it appeared that plaintiff sold certain personal property, and took a mortgage to secure payment, and, after the mortgagors had paid a part of the purchase price, they, with the consent of the mortgagee, sold their interest to another, who orally agreed to pay the mortgagee the balance due, and accept the property subject to the terms of the mortgage. The mortgage was void as to creditors of the mortgagor, because not accompanied by an affidavit of good faith. The property was delivered by the mortgagors to the second purchasers, and it was thereafter levied upon by defendants in a suit by creditors of the former. The mortgage, by its terms, provided that the mortgagee should be entitled to the immediate possession of the property if attached by creditors of the mortgagor. *Held*, that it was error to grant defendant a nonsuit on the ground that plaintiff had no title or right to possession which would support conversion.—*Id.*

Pleading—Allegation of Wrong Done by Defendant.

3. A complaint in an action for conversion, which avers that plaintiff is the owner of the property described, states its value, and the acts of defendant which deprive him thereof, and asks damages, is sufficient, and need not aver that defendant did any wrong.—*Id.*

Pleading—Allegation of Demand.

4. In an action for the conversion, where the taking is wrongful, it is not necessary to allege a demand before the commencement of the action.—*Id.*

CORPORATIONS.**See SURETIES, 2, 3.****Foreign Corporations—Conditions Precedent to Doing Business.**

1. The requirements of Compiled Statutes 1887, Sections 442-444, that a foreign corporation shall, before doing any business of any kind within the territory, file certain papers with the recorder of the county where it intends to do, or is doing, business, and invalidating its contracts and imposing on it a forfeiture of a certain sum per day during the period of its neglect, and Section 445, requiring it to file an annual report in the county where its business is carried on, are complied with by filing the same with the recorder of the county where its principal office for doing business within the state is located, and filings need not be made in every county where it may transact any item of business.—*Manhattan Trust Co. v. Davis et al.*, 273.

Foreign Corporations—Contracts—Forfeiture.

2. Forfeitures of contracts not immoral or against public policy are not to be declared unless the law under which the forfeitures are claimed is so clear and direct in language that it admits of but one construction by which the contract sued upon must be adjudged void and unenforceable.—*Id.*

Foreign Corporations—Penal Statutes—Construction.

3. A statute requiring foreign corporations, before doing any business of any kind within the state, to file certain papers in certain public offices, and prescribing penalties against the corporation which attempts, or commences, to do business in the state without first having filed the necessary papers, is, in a sense appertaining to construction, a "penal" statute, and is to be construed strictly—not liberally.—*Id.*

Transfer of Shares of Stock—Rights of Transferee.

4. Where a transfer of corporate shares is valid, no irregularity in the issuance of the stock certificate to the transferee can effect her interest or lessen her rights to the stock transferred.—*O'Rourke v. Schultz*, 285.

Tender of Shares of Corporate Stock.

5. A contract provided that, if the purchaser of a one-fourth interest in brick works should become dissatisfied with the purchase, she should be entitled to a return of the purchase price on surrender of the property sold. Subsequently, by agreement of both parties, her interest was transferred to a corporation, and 2,500 shares of its stock received, as representing the property. After the purchaser had sued to rescind the contract, she assigned it, and her assignee tendered the vendor 2,500 shares to which she was legally entitled as against the corporation. *Held*, that such tender was valid, notwithstanding alleged irregularities in the issuance of the certificate representing the stock.—*Id.*

Tender of Shares of Corporate Stock—Waiver.

6. Where defendant objected to a tender of corporate shares on the ground that they had been attached in the hands of a former owner only, he cannot subsequently object to such tender on the ground of irregularities in the issuance of the certificates.—*Id.*

Foreign Corporations—Pleading.

7. Since it is unnecessary for a foreign corporation plaintiff, bringing action on a domestic contract, to allege in its complaint that it complied with the statutes of the state entitling it to do business therein, the question of its noncompliance therewith can only be raised by answer.—*American Hand-Sewed Shoe Co. v. O'Rourke*, 530.

CORPUS DELICTI.

See CRIMINAL LAW, 22, 27, 28.

COUNTIES.

Contract—Lowest Responsible Bidder.

1. Session Laws of 1897, page 48, Section 12, provided that the commissioners of B county should contract with the lowest responsible bidders for transcribing and indexing certain records. The board, without advertising for bids or any notice of its intention to let a contract, entered into an agreement with relators, whereby they agreed to do the indexing at a stipulated wage per month. Held, that the contract was void for want of compliance with the law, in that the county commissioners disregarded its requirements, both in failing to let the contract to the lowest bidder and in severing the work to be done and letting it under separate contracts to different parties.—*State ex rel. Lambert v. Coad*, 131.

Subject to Law Applicable to Municipal Corporations.

2. In the sense that a county's board of commissioners has no power other than is derivable from the provisions of the statute defining their powers, it comes within the rules and principles of law applicable to municipal corporations.—*Id.*

COUNTY SURVEYORS.

As to an act of the legislature increasing or diminishing compensation, see CONSTITUTION, 4, 5, 6.

COURTS.

Action On Injunction Bond—State and Federal Courts.

An injunction bond given in a federal court may be sued on in a state court without an order of the federal court granting leave when a final disposition of the injunction suit has been made by the entry of judgment of dismissal, with costs against the plaintiff.—*Montana Mining Co. v. St. Lou's Mining & Milling Co.*, 311.

CRIMINAL LAW.

See APPEAL, 9, 10, 12, 34.

EVIDENCE, 7, 8, 10, 11, 15, 16, 19.

INSTRUCTIONS, 22.

JURY, 8, 9, 11.

PLEADING AND PRACTICE (Criminal.)

TRIAL, 3, 4, 5, 6, 8, 9, 11.

VERDICT, 1, 2.

Instructions—Presumption of Innocence—Reasonable Doubt.

1. It is error to refuse to charge that accused is presumed innocent until proven guilty beyond a reasonable doubt, though the court gave an instruction properly defining a reasonable doubt.—*State v. Harrison*, 79.

Instructions—Presumption of Innocence—Reasonable Doubt.

2. The presumption of innocence has the weight and effect of evidence in the defendant's behalf—introduced by the law in his behalf—and the mere definition of a reasonable doubt does not supply the lack of an instruction upon the presumption of innocence.—*Id.*

"Reasonable Doubt."

3. "A reasonable doubt, within the meaning of the law, is not a mere imaginary or possible doubt, but a substantial doubt, based upon reason and common sense, and induced by the facts and circumstances attending the particular case, and growing out of the testimony. It is such a doubt as will leave one's mind, after a careful examination of all the evidence, in such a condition that he cannot say that he has an abiding conviction, to a moral certainty, of the defendant's guilt as charged." *Held*, a good definition of a reasonable doubt.—*Id.*

Murder—Instruction—Justifiable Homicide.

4. On a murder trial, where instructions upon the law of justifiable homicide are unnecessary, it is not error, that defendant can complain of, to give such instructions.—*State v. Brooks*, 146.

Murder—Instruction—Manslaughter.

5. Where evidence proved murder in the first degree, an instruction that, to make the killing manslaughter, it must be done "upon the instant,—that is, at the time the provocation is given, and under the influence of it, before the blood has had time to cool, and before the mind has had time to consider the character and gravity of the act about to be done, and not from hatred or pre-existing revenge," is not prejudicial to defendant.—*Id.*

Murder—Instruction—Manslaughter.

6. It is not error to instruct the jury that a homicide would not be manslaughter if committed in an unreasonable fit of passion.—*Id.*

Murder—Instruction—Insanity.

7. An instruction that, "if defendant was so far in possession of his mental faculties as to be capable of knowing that the act of killing was wrong, any mental defect which might cause him to more readily give way to passion than a man ordinarily reasonable could not be considered," is not prejudicial to a defendant who claimed to be insane and was convicted of murder in the first degree.—*Id.*

Murder—Instruction—Burden of Proof.

8. On a trial for murder, it is proper to charge "that, upon proof of the commission of the homicide by the defendant, the burden of proving circumstances of mitigation or excuse devolves upon him, unless the proof on the part of the prosecution tends to show that the crime only amounts to manslaughter, or that he was excusable," under Penal Code, Section 2081, regulating the burden of proof in such cases.—*Id.*

Murder—Instruction—Insanity—Preponderance of Evidence—Reasonable Doubt.

9. It is not error to refuse to instruct, in a murder case, that defendant should be acquitted if a fair preponderance of evidence shows his insanity; the correct rule being that he is entitled to an acquittal where the evidence raises a reasonable doubt of his sanity when the crime was committed.—*Id.*

Mutilating, Defacing or Altering Public Records.

10. Section 230 of the Penal Code refers to mutilating, defacing or altering books, maps and other documents which are matters of evidence, and has no reference to the making of a correct index of the contents of any books in a public office.—*State ex rel. Coad v. Judge, etc.*, 171.

Disbarment Proceedings.

11. A disbarment proceeding is not a criminal prosecution, nor an aid to a criminal investigation.—*In re Wellcome*, 213.

Disbarment Proceedings—Right of Accused to Meet Witnesses Face to Face.

12. A disbarment proceeding is not a criminal prosecution, so as to entitle the respondent to be confronted personally by the witnesses against him, under Constitution, Article III, Section 16, providing that a person accused of a crime shall have the right to meet the witnesses against him face to face.—*In re Wellcome*, 259.

Opening Statement of Prosecuting Attorney.

13. It is not "misconduct" on the part of the prosecuting attorney to state to the jury in his opening statement that the defendant had made a confession, even though said confession be subsequently held to be inadmissible.—*State v. Sheppard*, 323.

Murder—Instruction—Insanity—Irresistible Impulse.

14. In a prosecution for homicide, a charge "that if defendant knew, when committing the act, that it was wrong, and that he was mentally capable of choosing to do or not to do the act, and to govern his conduct accordingly, that he was guilty, even though he was not perfectly sane at the time of the act; and that, if his mental powers were so deficient that he had no will, conscience or controlling mental power, or if, from violence of mental disease, his intellectual power was at the time obliterated, then he was not criminally responsible, the question being whether, at the time of the act, he had mental capacity to entertain a criminal intent, and whether he did in fact entertain it," is not erroneous in failing to charge as to irresistible impulse, where the only evidence of such impulse was defendant's statement that a few minutes before the homicide he was attacked by a dizzy spell, but had no recollection what occurred thereafter until the next day; since from his statement his act must have been the result of unconsciousness or delirium, while irresistible impulse implies knowledge of right and wrong in some degree.—*State v. Peel*, 358.

Murder—Insanity—Irresistible Impulse.

15. When one commits an act, otherwise criminal, under an irresistible impulse, which is the result of overpowering mental disease, and which he cannot control, he is not criminally responsible.—*Id.*

Homicide—Presumption of Sanity.

16. The legal presumption of sanity is rebutted and disappears whenever sufficient proof is introduced to raise a reasonable doubt as to defendant's sanity.—*Id.*

Homicide—Insanity—Burden of Proof.

17. The burden of establishing the defense of insanity by a preponderance of the evidence is never cast upon the defendant. If at the end of the state's case no proof has been introduced upon this subject, the legal presumption of sanity prevails, and the burden then devolves upon the defendant to produce some proof of his insanity; but he is not bound to produce any more than is sufficient to raise a reasonable doubt of his sanity, and the moment this appears the burden is at once upon the state to establish the guilt of the defendant beyond this reasonable doubt, since a reasonable doubt of the sanity of the defendant is, in a legal sense, a reasonable doubt of his guilt.—*Id.*

Disbarment Proceedings—Failure of Accused to Testify.

18. A proceeding for disbarment is not a criminal prosecution, nor in aid of criminal investigation, and Penal Code, Section 2442, providing that the failure of the accused to testify in his own behalf shall not be used to his prejudice, has no application to such proceeding.—*In re Welcome*, 450.

Disbarment Proceedings—Reasonable Doubt.

19. The rule in criminal prosecutions that the guilt of the accused must be proved beyond a reasonable doubt does not apply to proceedings for disbarment.—*Id.*

Disbarment Proceedings—Good Character of Accused.

20. That the accused had always borne an excellent reputation for integrity is in his favor during trial, but is no defense to the crime if actually committed.—*Id.*

Homicide—Instruction on Weight of Evidence.

21. Where, in a prosecution for homicide, decedent's identity was in issue, it was not error to refuse defendant's request to charge that a witness having but a casual ac-

quaintance with a party is entitled to comparatively little weight after a comparatively short lapse of time, since such request amounted to a charge on the weight of evidence.—*State v. Papp*, 478.

Homicide—Proof of *Corpus Delicti*.

22. Penal Code, Sec. 358, provides that no person can be convicted of murder or manslaughter unless the death of the person alleged to have been killed, and the fact of the killing by the defendant as alleged, are established as independent facts,—the former by direct proof, and the latter beyond a reasonable doubt. *Held* that, since the *corpus delicti* is directly proved when a dead body is found under circumstances warranting an inference that a person had been feloniously killed, direct proof of the identity of the victim is not required, but only direct proof of death.—*Id.*

Homicide—Circumstantial Evidence Reviewed.

23. Circumstantial evidence reviewed and, *held*, sufficient to sustain a verdict of murder in the first degree.—*Id.*

Homicide—Evidence Reviewed.

24. Evidence reviewed and, *held*, to justify a verdict of guilty of murder—*State v. Hurst*, 484.

Instructions As to Individual Duties of Jurors.

25. Where a jury in a criminal case had been fully instructed as to their individual duties under the law, it was not error for the court to refuse to instruct that if, after consideration of the whole case, any juror entertained any reasonable doubt of the guilt of the defendant, it was the duty of such juror not to vote for a verdict of guilty, nor to be influenced in so voting for the single reason that a majority of the jury were in favor of a verdict of guilty.—*Id.*

Information—Indorsement of the Names of Witnesses.

26. Under Penal Code of 1896, Sec. 1784, requiring the county attorney to indorse on the information, at the time of its filing, the names of the witnesses then known to him, where the name of a witness known to the county attorney at the filing of the information was omitted, but there was no evidence of bad faith, the court properly permitted it to be indorsed on the day before trial.—*State v. Calder*, 504.

Homicide—Proof of *Corpus Delicti*.

27. On a trial for murder, the identity of the person alleged to have been killed was proved by direct evidence of an accomplice, who was an eyewitness, and assisted in disposing of the body by burning it and throwing the ashes into a river, corroborated by circumstantial evidence. The death of a human being was directly proved, by the identification of certain teeth and charred bones found in a river near the point where the body was burned, and there was circumstantial evidence to prove the identity of the deceased. *Held*, that the evidence was sufficient to satisfy the requirements of Penal Code, Sec. 358, that the "death" of the person alleged to have been killed must be established by "direct proof," as an independent fact, and of Code of Civil Procedure, Sec. 3108, defining "direct proof" as that which proves the fact in dispute, without an inference or presumption.—*Id.*

Homicide—Proof of *Corpus Delicti*.

28. In prosecutions for murder, proof of the *corpus delicti* involves the establishment of the fact that a murder has been committed, but includes neither the identity of the person alleged to have been killed, nor the killing by the person accused.—*Id.*

Accomplice—Corroboration.

29. Under Penal Code, Sec. 2069, requiring an accomplice to be corroborated by other evidence which of itself tends to connect the defendant with the crime, it is not essential that the evidence in corroboration must be sufficient, when standing alone, to connect the defendant with the crime, but it is sufficient if it tends so to do.—*Id.*

Degrees of Homicide—Instruction.

30. The court is not bound to charge upon murder in the second degree, or upon a lower grade of homicide, when there is no evidence, direct or circumstantial, to which the instruction could apply.—*Id.*

Homicide—Instruction—Burden of Proof.

31. On a trial for murder, the refusal to charge specifically as to the burden of proof resting on the state to establish beyond reasonable doubt the existence of each link in the chain of circumstantial evidence was not error, where there was direct evidence of the main fact, and the indirect evidence was merely in corroboration.—*Id.*

Defendant as a Witness—Impeachment.

32. When a defendant is sworn, and testifies in his own behalf, he is subject to the same rules of cross-examination and impeachment as any other witness, and it is competent for the state to impeach his testimony by evidence that his general reputation for truth, honesty and integrity is bad.—*State v. Schnepel*, 523.

Instruction—Defendant's Witnesses.

33. An instruction calling special attention to the defendant's witnesses and giving special direction as to how their evidence should be weighed, is properly refused as invading the province of the jury.—*Id.*

Instruction—Preponderance of Evidence.

34. The refusal of an instruction casting upon the state no greater burden than that of showing by a preponderance of the evidence the circumstances establishing defendant's guilt was proper, since the universal rule is that in all such cases the prosecution must establish such circumstances beyond a reasonable doubt.—*Id.*

Motion to Set Aside Information—New Trial—Appeal.

35. Under Penal Code, Section 1910, providing that an information may be set aside when not properly subscribed by the county attorney, and Section 1911, providing that, unless a motion to set aside be made before demurrer or plea, this ground of objection is waived, if the motion to set aside the information was made in the trial court, and improperly refused, the error can be reviewed only on appeal from the judgment; it cannot be reviewed on an appeal from an order granting a new trial, not being one of the grounds for new trial enumerated under Penal Code, Section 2192.—*Id.*

Alibi—Burden of Proof.

36. The burden of proof is not shifted by the defense of an alibi, and defendant cannot be convicted if the evidence raises a reasonable doubt of his presence at the time and place where the crime was committed.—*State v. McClellan et al.*, 532.

Alibi—Instruction.

37. An erroneous instruction charging that the defense of an alibi, to be entitled to consideration, must be proved by the defendant, is not cured by a subsequent charge telling the jury to acquit if they had a reasonable doubt of defendant's presence at the time and place of the commission of the alleged crime, as said charges are irreconcilable and misleading.—*Id.*

Prosecuting Witness—Redirect Examination.

38. Where the prosecuting witness testified on cross-examination that he had been in jail, he may, on redirect examination, explain the circumstances of his imprisonment.—*Id.*

Instruction as to Witness.

39. There is no error in refusing an instruction in a criminal case which singles out one witness, and directs the jury to consider his condition in particular at the time of the transactions concerning which he testified.—*Id.*

Instruction—Testimony of Defendant.

40. It is not error for the court to refuse a request to charge as to the duty of the jury in their consideration of the testimony of the defendant, where such subject is sufficiently covered by the instruction of the court.—*Id.*

Accomplice—Corroboration.

41. Where the defendant's own testimony in itself, and without the aid of the testimony of an alleged accomplice, tends to connect the defendant with the commission of the crime, such testimony is in law a sufficient corroboration of the alleged accomplice.—*State v. Fisher*, 540.

Accomplice—Corroboration.

42. Where the jury might have found from the evidence that an alleged accomplice was not an accomplice, a conviction can be rightly had upon his uncorroborated testimony.—*Id.*

Homicide—Instructions—Degrees of Murder.

43. Where the proof of defendant's guilt is wholly circumstantial, and the evidence warrants a conviction of murder in either first or second degree, it is reversible error for the court to withhold from the consideration of the jury murder of the second degree, and instruct the jury that the defendant "is either guilty of murder in the first degree or he is not guilty at all."—*Id.*

Murder—Defense—Burden of Proof.

44. Under Penal Code, Section 2061, upon a trial for murder, the commission of the homicide by the defendant being proved, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable, the crime is presumed to be murder of the second degree, and the burden or proving circumstances of mitigation, or that justify or excuse it, devolves upon the defendant,—if he would reduce the crime to manslaughter, there must be produced evidence sufficient to create a reasonable doubt of the existence of malice.—*Id.*

Oral Comments on the Instructions.

45. Since Penal Code, Section 2070, commands the court to charge the jury in writing, and forbids oral comments upon the instructions, unless by agreement of both the state and the accused, mere silence of the accused or his counsel is not equivalent to a consent to the giving of oral instructions.—*Id.*

Oral Instructions.

46. The provisions of Penal Code, Section 2070, requiring written instructions, and forbidding oral comments on the instructions unless by agreement of both the state and the accused, are mandatory, and the violation thereof is reversible error.—*Id.*

Oral Instructions.

47. Under Penal Code, Section 2070, a charge is oral if not in writing at the time of its delivery and read to the jury as written,—and the same is true of the information mentioned in Penal Code, Section 2123, and the giving of any such oral instructions or comments on the instructions is prejudicial error, even though they be taken down in short hand by the official stenographic reporter who is required by Code of Civil Procedure, Section 371, "to take full notes of all the proceedings at the trial."—*Id.*

Oral Instructions.

48. Where a defendant's affidavit for continuance stated that certain witnesses, if present, would testify to his good character, and the state admitted the fact that they would so testify, it was a reversible error for the court to charge in writing that good character, "if proved by competent evidence," always goes to the defendant's credit, and when the jury returned for further instructions as to their right to con-

sider his past life, to instruct them orally to the effect that they could consider nothing outside of the testimony given on the witness stand, but that the defendant's failure to produce the depositions of his witnesses should not prejudice the jury against him, although the charge on the subject when the case was submitted was otherwise correct.—*Id.*

Murder—Instruction—Expense of New Trial.

49. On a trial for murder, it is improper for the court to direct the attention of the jury to the expense incident to a new trial as the reason why they should reach a verdict.—*Id.*

Insufficiency of Evidence—Advising Verdict of Not Guilty.

50. If a trial judge is of the opinion that the defendant, if convicted, should be granted a new trial because of the insufficiency of the evidence, it is his duty to advise the jury to return a verdict of not guilty.—*Id.*

Coercing Verdict of Jury.

51. On a trial for murder, where the jury informed the court that there was no prospect of an agreement on a verdict, it was reversible error for the court to remark: "Feeling as I do about the matter, I do not see any reason why a jury should disagree in the matter, * * * although I do not care to force any man, against his conscience, to agree to a verdict which he does not believe in. * * * Feeling as I do about the case, * * * I do not feel that I should discharge you,"—since such remark was calculated to impress on the jury that the verdict should be one of guilty.—*Id.*

Murder—Compulsion as a Defense.

52. If the evidence discloses that defendant was commanded to commit the homicide by one who threatened to take defendant's life if he refused, and, believing the threat would be executed, to save his own life, he killed the deceased, who was, when slain, a mile distant from the place where the threat was made, then defendant is guilty of a deliberate murder.—*Id.*

DAMAGES.

Judgment on the Pleadings—Proof.

When judgment is rendered on the pleadings, it is not necessary—under Code of Civil Procedure, Sections 754, 1020,—for the trial court to hear proof to determine the amount of damages.—*Montana Mining Co. v. St. Louis M. & M. Co.*, 311.

DEPOSITION.

As to the deposition of a witness out of the state, see WITNESS, 4.

DEPUTY COUNTY ATTORNEYS.

Annual Compensation.

1. Political Code, Section 4596, declares that the "maximum annual compensation allowed to any deputy" is as follows.—setting out various officers whose salaries are declared "not to exceed" the sum fixed, but in providing for the salary of chief deputy county attorney the words "not to exceed" were omitted. *Held*, that, since the statute by a general controlling limitation provided that all the amounts fixed should be "the maximum annual compensation allowed," the words "not to exceed" were surplusage, and hence the compensation of chief deputy county attorney was not fixed by the statute at a certain sum, but might be established at a sum less than the maximum named, provided the power to determine the number of deputies and their compensation, within the maximum limits prescribed, may be exercised by some authority elsewhere recognized by law.—*Penwell v. Board of County Commissioners*, 351.

Board of County Commissioners Have Power to Fix Salary.

2. Since deputy county attorneys are included by Act March 19, 1895, in Political Code, Section 4596, fixing the maximum salary of deputy county officers, the board of county commissioners have power to fix the salaries of deputy county attorneys under Session Laws 1893, p. 60, establishing the number of deputy county officers, and providing that their compensation shall be determined by the board of county commissioners, within the maximum limits fixed by the act, though deputy county attorneys are not provided for therein.—*Id.*

DISCRETION OF COURT.

See INJUNCTION, 9.

Sending Exhibits to Jury Room.

1. *Quere.* Whether, under the provisions of Section 2122 and Subdivision 2 of Section 2192 of the Penal Code, it is error to send to the jury while in retirement such exhibits, admitted in evidence, as the skull of the decedent, his bloody hat and a certain blood-stained sack found at the place of the killing; or whether, without the defendant's consent, but in the exercise of a wise and sound discretion, the court may send to the jury in retirement exhibits other than papers.—*State v. Allen*, 118.

Granting a New Trial—Conflict of Evidence.

2. The Supreme Court will not disturb the discretion of the trial court in granting a new trial, on the ground that the evidence was insufficient to sustain the verdict, where the record discloses a substantial conflict as to material matters.—*O'Rourke v. Sherman*, 310.

Granting a New Trial.

3. The rule that the trial court's action in granting a new trial cannot be disturbed, even if it committed errors during the course of the trial, because such action was discretionary, applies only when the motion is made upon grounds which appeal to the discretionary power of the court, hence does not apply where the motion was made upon assignments of errors of law only.—*State v. Schnepel*, 523.

Denying Injunction *Pendente Lite*.

4. It is not an abuse of discretion to deny an application for an injunction *pendente lite*, where it does not appear that the grievances complained of will work irreparable injury pending the determination of the suit.—*Boston & Montana Consol. C. & S. Mining Co. v. Montana Ore Purchasing Co.*, 557.

EQUITY.**Actions at Law and in Equity—Distinctions Abolished.**

1. Under the provisions of the statutes of Montana, the distinctions as to form between actions at law and in equity have been abolished, and the court, having jurisdiction of the parties, can afford such relief as the facts of the case may justify.—*Merchants' Nat'l Bank v. Great Falls Opera House Co.*, 33.

Irregularity in Assessment of Tax—Relief.

2. A court of equity will not grant relief to a taxpayer when the only ground alleged to invoke its aid is an irregularity in the assessment.—*Deloughrey v. Hinds*, 260.

Implied Findings.

3. The Code of Civil Procedure, 1895, (Sec. 1111 *et seq.*) recognizes the system of implied findings, which applies to equity as well as law cases, under this system a judgment will not be reversed on appeal for defects in the findings unless the losing party has proceeded in accordance with the requirements of the provisions of Sec. 1114 *et seq.*—*Haggin v. Sattle*, 375.

Findings of a Jury are Advisory Merely.

4. Since findings of a jury in an equity suit are advisory merely, a judgment will not be reversed on appeal for the giving of erroneous instructions, where the court in making its findings of fact, approved some of those found by the jury, and made other findings, all the findings of the court being supported by the evidence.—*Id.*

EVIDENCE.

Sureties—Action to Enforce Contribution.

1. In an action to enforce contribution, under the Code of Civil Procedure, Section 1242, which provides that a surety paying a judgment upon which he is jointly liable with others as surety shall be entitled to the benefit of the judgment to enforce contribution or repayment, if within 10 days after payment he shall file with the clerk a notice of payment, and claim of contribution, evidence that the execution of the notes on which the judgment paid was entered was authorized by the corporation defendant is immaterial.—*Northwestern Nat'l Bank v. Great Falls Opera House Co.*, 1.

Sureties—Action to Enforce Contribution.

2. In a proceeding to enforce contribution from a co-surety, by a surety who has paid and taken an assignment of a judgment against them, it is competent for the paying surety to testify that he did not intend to have the judgment satisfied as to his co-surety, where he had, after payment and assignment of the judgment, procured a formal satisfaction of it to release his real estate from the apparent lien thereof.—*Merchants Nat'l Bank v. Great Falls Opera House Co.*, 33.

Mining Claim—Boundaries.

3. Where one mining claim encroaches upon another, it is not error to permit the engineer, who has made a plat thereof, to point out the exterior boundaries of the encroaching claim, as it tends to enlighten the jury as to the controversy.—*Bramlett v. Flick*, 95.

Mining Claim—Practical Surveyor—Opinion.

4. A question as to whether a practical surveyor, familiar with the methods of locating claims, and familiar with surveys in mountainous countries and with the neighborhood, could take the description in a notice of location of a claim, and, starting at the point of discovery, find the claim described therein, is incompetent, as calling for an opinion.—*Id.*

Mining Claim—Surveyor—Opinion.

5. In an action to determine the boundaries of conflicting mining claims, evidence as to whether or not a surveyor found the boundaries of a claim without assistance, whether the blazing upon posts appeared to be old or new, and whether he could readily find the blazes on the trees along the boundaries, and whether they could be traced from one to another, relates to matters of fact, and is not open to the objection of being opinion evidence.—*Id.*

Criminal Law—Presumption of Innocence.

6. The presumption of innocence has the weight and effect of evidence in the defendant's behalf—introduced by the law in his behalf.—*State v. Harrison*, 79.

Homicide—Insanity.

7. Where there is no evidence showing that a defendant charged with murder was insane, evidence of his declarations and conduct is inadmissible to prove insanity, unless the purpose of such evidence is disclosed.—*State v. Brooks*, 146.

Homicide—Good Character of Defendant.

8. Evidence that a defendant had preached in a church at divers times is inadmissible to prove his good character.—*Id.*

Disbarment—Failure of Criminal Prosecution.

9. In disbarment proceedings grounded on an alleged bribery, an affidavit stating the existence of prejudice in favor of the accused in the county where criminal proceedings were attempted against him is immaterial, when it does not state that the failure of the criminal proceedings was due to this prejudice.—*In re Wellcome*, 213.

Homicide—Insanity—Nonexpert Witnesses—Opinion.

10. The opinion of nonexpert witnesses, touching the mental condition of the person on trial, or the validity of whose act is in controversy, must be founded upon their own observation; they cannot be permitted to give an opinion founded upon facts learned from other sources than their own observation, hence, a nonexpert witness, who was not present at a homicide, cannot express his opinion as to the sanity of the accused, based both on his previous knowledge of accused and hearsay knowledge of facts attending the homicide.—*State v. Peel*, 353.

Homicide—Insanity—Nonexpert Witness—Opinion.

11. A nonexpert witness should always speak as of the time of his own observation, he should not be permitted to express an opinion as to the temporary or permanent nature of mental disease.—*Id.*

Action to Establish an Adverse Claim to a Mining Location.

12. Where a receiver's receipt, under which plaintiff is seeking to establish an adverse claim to a mining location, is shown to have been canceled, evidence of defendant's adverse location and publication of notice are admissible in evidence.—*Murray v. Polglase*, 401.

Disbarment Proceedings—Evidence Sufficient to Establish Guilt.

13. The testimony of two credible witnesses to acts by the accused constituting bribery was a relation involving much detail and many incidents, and was given by both on three separate occasions without material variation, and was corroborated by the production by one of them of a large sum of money which they claimed to have received as a bribe from the accused, and the witness producing the money was a man of small means. The accused failed, without reason, to testify in his own behalf, and his attorneys answered on information and belief only. *Held*, there being no evidence to the contrary, that the evidence given was sufficient to establish the guilt of accused.—*In re Wellcome*, 450.

Homicide—Conversation With Deceased.

14. Permitting the prosecution to ask a witness as to a conversation between himself and deceased, over defendant's objection that he was not present, was not error, where the witness later testified to defendant's presence.—*State v. Pepo*, 473.

Criminal Law—Mining Cages.

15. In a prosecution for violation of the Laws of 1897, p. 245, making it unlawful for a corporation to work through a vertical shaft where mining cages are used to a greater depth than 300 feet, unless the cage shall be provided with an iron-bonneted safety cage, evidence that such devices or cages would be dangerous is inadmissible, since the question whether such appliances were the best or wisest method is for the legislature to decide.—*State v. Anaconda Copper Mining Co.*, 498.

Criminal Law—Proof of *Corpus Delicti*.

16. On a trial for murder, the identity of the person alleged to have been killed was proved by direct evidence of an accomplice, who was an eyewitness, and assisted in disposing of the body by burning it and throwing the ashes into a river, corroborated by circumstantial evidence. The death of a human being was directly proved, by the identification of certain teeth and charred bones found in a river near the point where the body was burned, and there was circumstantial evidence to prove the identity of the deceased. *Held*, that the evidence was sufficient to satisfy the requirements of Penal Code, Sec. 358, that the "death" of the person alleged to have

been killed must be established by "direct proof," as an independent fact, and of Code of Civil Procedure, Sec. 3108, defining "direct proof" as that which proves the fact in dispute, without an inference or presumption.—*State v. Calder*, 504.

Criminal Law—Proof of *Corpus Delicti*.

17. In prosecutions for murder, proof of the *corpus delicti* involves the establishment of the fact that a murder has been committed, but includes neither the identity of the person alleged to have been killed, nor the killing by the person accused.—*Id.*

Accomplice—Evidence in Corroboration.

18. Under Penal Code, Sec. 2089, requiring an accomplice to be corroborated by other evidence which of itself tends to connect the defendant with the crime, it is not essential that the evidence in corroboration must be sufficient, when standing alone, to connect the defendant with the crime, but it is sufficient if it tends so to do. *Id.*

Prosecuting Witness—Impeachment.

19. Where a witness for the state testified that the prosecuting witness had paid out money for drinks in a saloon before the alleged robbery was committed, it was competent on cross-examination to show that the prosecuting witness had spent all his money before the robbery.—*State v. McClellan et al.*, 532.

EXECUTORS AND ADMINISTRATORS.

See APPEALS, 18, 19, 20.

FEEs AND COMPENSATION.

See CONSTITUTION, 3, 4, 5, 6.

DEPUTY COUNTY ATTORNEYS, 1, 2.

FINDINGS.

See APPEAL, 38.

See EQUITY, 4.

See REFERENCES, 1, 2.

WATER RIGHTS, 2.

Implied Findings.

The Code of Civil Procedure, 1895, (Sec. 1111 *et seq.*) recognizes the system of implied findings, which applies to equity as well as law cases, under this system a judgment will not be reversed on appeal for defects in the findings unless the losing party has proceeded in accordance with the requirements of the provisions of Section 1114 *et seq.*—*Haggin v. Saile*, 375.

FRAUDULENT SALES.

Purchaser's Failure to Take Possession—Presumption of Fraud.

1. Where a joint owner of personalty which is in the possession of another joint owner sells his interest, the purchaser's failure to take possession does not, as against execution creditors of the seller, avoid the sale, under Civil Code, Section 4491, providing that every transfer of personal property by a person in possession or control of the property shall be conclusively presumed to be fraudulent, and therefore void, if not accompanied by an immediate delivery, and followed by actual and continued change of possession. Such presumption is to be indulged only where the person making the transfer has at the time the possession or control of the property.—*Yank v. Bordeaux*, 205.

Purchaser from one of several joint owners—Notice.

2. Where one of several joint owners of personalty sells his interest, the purchaser

need not notify the other co-owners of the sale, in order to make it valid as against execution creditors of the seller.—*Id.*

Action by Purchaser Against Sheriff for Seizing Property Under Execution.

3. After plaintiff had purchased personalty in possession of third persons, it was seized by an officer under execution against the seller. In an action against the officer for the proceeds of its sale, *held*, that the plaintiff's failure to notify defendant and the seller's creditors of the sale, prior to the levy, did not preclude his right to recover.—*Id.*

Rights of Attaching Creditor—Purchaser for Value.

4. *Obiter*: The general rule is that an attaching or execution creditor succeeds to and acquires only the rights of his debtor, while a purchaser for value and without notice may acquire greater rights and a higher title than his vendor possessed.—*Id.*

INDICTMENT AND INFORMATION.

See **NEW TRIAL**, 10.

PLEADING AND PRACTICE (Criminal).

INJUNCTION.

See **APPEAL**, 35.

See **PLEADING (Civil)** 5, 6, 7, 8.

Void Contract With County.

1. Where the action of a board of county commissioners in letting a contract is void for want of compliance with the law, the execution of such a contract, or payment for work done under it, will be enjoined at the instance of a taxpayer.—*State ex rel. Lambert v. Coad*, 131.

To Restrain Tax Sale of Separate Lots Assessed in Gross.

2. Under Laws of 1839, page 219, Section 4, which makes it the duty of a taxpayer to furnish the assessor a list of all his property, and Section 5, requiring the assessor to value each lot separately, and Laws of 1837, page 82, Section 22, which provides that any person feeling aggrieved by any assessment may apply to the board of equalization for the correction thereof, equity will not enjoin the sale of separate lots assessed in gross, for the collection of the taxes thereon, where the complainant does not show that he attempted to have the irregularity corrected by application to the board, or some excuse for not doing so.—*Deloughrey v. Hinds*, 280; *Cobban v. Hinds*, 338.

To Restrain Enforcement of Judgment.

3. Where, after a judgment for the rescission of a contract on plaintiff's surrender of property received thereunder, it appears that she was unable to make such surrender, defendant is entitled to restrain the enforcement of the judgment.—*O'Rourke v. Schultz*, 285.

Action On Injunction Bond—State and Federal Courts.

4. An injunction bond given in a federal court may be sued on in a state court without an order of the federal court granting leave when a final disposition of the injunction suit has been made by the entry of judgment of dismissal, with costs against the plaintiff.—*Montana Mining Co. v. St. Louis Mining & Milling Co.*, 311.

To Restrain Tax Sale of Lands Listed to Wrong Person.

5. Under Political Code, Sections 4023-4026, which prohibit courts and judges from restraining the sale of property for nonpayment of any tax, except where the tax is illegal or not authorized by law, or where the property is exempt from taxation, the listing of lands to the wrong person is no ground for restraining the tax sale; since

under Political Code, Sections 3700, 3916, 4014, it is but an irregularity or informality, which, of itself, does not avoid the assessment nor render the tax "illegal or unauthorized."—*Cobban v. Hinds*, 338.

To Restrain Tax Sale for Lack of Legal Notice.

6. The fact that the notice under which a tax sale was threatened was published but three weeks, whereas the statute required four weeks, does not render the taxes "illegal or unauthorized by law," within Political Code, Sections 4023-4026, so as to authorize the enjoining of the collection of such tax.—*Id.*

To Restrain Tax Sale of Lands Purchased by County.

7. The fact that a county treasurer intends to violate Political Code, Sections 3922, 3923, by exposing for sale for the delinquent taxes for 1898 part of the lands purchased by the county at the tax sales of 1897, and yet unredeemed, does not entitle the owner of the equity of redemption to an injunction; since Section 4026 provides that the remedy before the board of equalization shall supersede the remedy of injunction and all other remedies which might be invoked to prevent a collection of taxes alleged to be irregularly levied or demanded, except in unusual cases, where the remedy thereby provided is deemed by the court to be inadequate.—*Id.*

Discretion of Court in Denying.

8. It is not an abuse of discretion to deny an application for an injunction *pendente lite*, where it does not appear that the grievances complained of will work irreparable injury pending the determination of the suit.—*Boston & Montana Consol. C. & S. Mining Co. v. Montana Ore Purchasing Co.*, 557.

Mandamus to Court to Hear Motion to Dissolve or Modify.

9. A *mandamus* will not issue to compel a court to hear a motion to dissolve or modify an interlocutory injunction granted on order to show cause, based on the discovery of additional evidence tending to establish facts alleged in opposition to the injunction where the motion to modify is based upon the same facts and rests upon the same grounds as those which had been presented in opposition to the granting of the injunction, and where the privilege of applying for such dissolution or modification was not reserved in the order granting the injunction; such hearing being in the discretion of the court.—*State ex rel. Hickey v. Second Jud. Dist. Court*, 564.

INSTRUCTIONS.

As to credibility of witnesses, see WITNESS, 1, 2.

As to presumption of innocence, reasonable doubt, etc., see CRIMINAL LAW, 1, 2, 3.

As to the law applicable to mining claims, see MINES AND MINING, 9.

As to justifiable homicide, see CRIMINAL LAW, 4.

As to manslaughter, see CRIMINAL LAW, 5, 6.

As to insanity, see CRIMINAL LAW, 7, 9, 14.

As to burden of proof in homicide cases, see CRIMINAL LAW, 8.

As to identity of vein, see MINES AND MINING, 14, 16.

As to continuity of vein, see MINES AND MINING, 15.

As to individual duties of jurors in a criminal case, see CRIMINAL LAW, 25.

Assuming the Existence of a Fact in Controversy.

1. The court, in its instructions, should not assume the existence of a fact in controversy.—*Butte & Boston Mining Co. v. Societe Anonyme d. M. d. L.*, 177.

Invading Province of Jury.

2. *Obiter*: It is the right of a jury to draw their own conclusions of fact from the evidence, and the court must avoid language which "virtually" decides facts, and withdraws their determination from the consideration of the jury.—*Butte & Boston Mining Co. v. Societe Anonyme d. M. d. L.*, 177.

Inconsistent Instructions in a Criminal Case.

3. Where instructions on a material point in a criminal case are inconsistent, some correct and others incorrect, a conviction will be reversed.—*State v. Peel*, 368.

Equity Case—Instructions to Jury.

4. Since findings of a jury in an equity suit are advisory merely, a judgment will not be reversed on appeal for the giving of erroneous instructions, where the court, in making its findings of fact, approved some of those found by the jury, and made other findings, all the findings of the court being supported by the evidence.—*Hagin v. Suttle*, 375.

Charge On the Weight of Evidence.

5. Where, in a prosecution for homicide, decedent's identity was in issue, it was no error to refuse defendant's request to charge that a witness having but a casual acquaintance with a party is entitled to comparatively little weight after a comparatively short lapse of time, since such request amounted to a charge on the weight of the evidence.—*State v. Pepo*, 473.

Degrees of Homicide.

6. The court is not bound to charge upon murder in the second degree, or upon a lower grade of homicide, when there is no evidence, direct or circumstantial, to which the instruction could apply.—*State v. Calder*, 504.

Burden of Proof.

7. On a trial for murder, the refusal to charge specifically as to the burden of proof resting on the state to establish beyond reasonable doubt the existence of each link in the chain of circumstantial evidence was not error, where there was direct evidence of the main fact, and the indirect evidence was merely in corroboration.—*Id.*

Invading Province of Jury.

8. An instruction calling special attention to the defendant's witnesses and giving special direction as to how their evidence should be weighed, is properly refused, as invading the province of the jury.—*State v. Schnepel*, 523.

Preponderance of Evidence—Reasonable Doubt.

9. The refusal of an instruction casting upon the state no greater burden than that of showing by a preponderance of the evidence the circumstances establishing defendant's guilt was proper, since the universal rule is that in all such cases the prosecution must establish such circumstances beyond a reasonable doubt.—*Id.*

Giving Requested Instruction—Appeal—Error.

10. Defendant cannot predicate error on the giving of an instruction which he requested.—*State v. McClellan et al.*, 523.

Alibi—Burden of Proof—Reasonable Doubt.

11. An erroneous instruction charging that the defense of an alibi, to be entitled to consideration, must be proved by the defendant, is not cured by a subsequent charge telling the jury to acquit if they had a reasonable doubt of defendant's presence at the time and place of the commission of the alleged crime, as said charges are irreconcilable and misleading.—*Id.*

As to Particular Witness.

12. There is no error in refusing an instruction in a criminal case which singles out one witness, and directs the jury to consider his condition in particular at the time of the transactions concerning which he testified.—*Id.*

As to the Duty of Jury.

13. It is not error for the court to refuse a request to charge as to the duty of the jury in their consideration of the testimony of the defendant, where such subject is sufficiently covered by the instructions of the court.—*Id.*

Degrees of Murder.

14. Where the proof of defendant's guilt is wholly circumstantial, and the evidence warrants a conviction of murder in either first or second degree, it is reversible error for the court to withhold from the consideration of the jury murder of the second degree, and instruct the jury that the defendant "is either guilty of murder in the first degree or he is not guilty at all."—*State v. Fisher*, 540.

Criminal Case—Oral Comments.

15. Since Penal Code, Section 2070, commands the court to charge the jury in writing, and forbids oral comments upon the instructions, unless by agreement of both the state and the accused, mere silence of the accused or his counsel is not equivalent to a consent to the giving of oral instructions.—*Id.*

Criminal Case—Oral Instructions.

16. The provisions of Penal Code, Section 2070, requiring written instructions, and forbidding oral comments on the instructions unless by agreement of both the state and the accused, are mandatory, and the violation thereof is reversible error.—*Id.*

Criminal Case—Oral Instructions.

17. Under Penal Code, Section 2070, a charge is oral if not in writing at the time of its delivery and read to the jury as written, and the same is true of the information mentioned in Penal Code, Section 2123, and the giving of any such oral instructions or comments on the instructions is prejudicial error, even though they be taken down in shorthand by the official stenographic reporter, who is required by Code of Civil Procedure, Section 371, "to take full notes of all the proceedings of the trial."—*Id.*

Criminal Case—Oral Instructions.

18. Where defendant's affidavit for a continuance stated that certain witnesses, if present, would testify to his good character, and the state admitted the fact that they would so testify, it was a reversible error for the court to charge in writing that good character, "if proved by competent evidence," always goes to the defendant's credit, and when the jury returned for further instructions as to their right to consider his past life, to instruct them orally to the effect that they could consider nothing outside of the testimony given on the witness stand, but that the defendant's failure to produce the depositions of his witnesses should not prejudice the jury against him, although the charge on the subject when the case was submitted was otherwise correct.—*Id.*

Criminal Case—Expense of a New Trial.

19. On a trial for murder, it is improper for the court to direct the attention of the jury to the expense incident to a new trial as the reason why they should reach a verdict.—*Id.*

Advising Verdict of Acquittal.

20. If the trial judge is of the opinion that the defendant, if convicted, should be granted a new trial because of the insufficiency of the evidence, it is his duty to advise the jury to return a verdict of not guilty.—*Id.*

Coercing Agreement of Jury.

21. On a trial for murder, where the jury informed the court that there was no prospect of an agreement on a verdict, it was reversible error for the judge to remark: "Feeling as I do about the matter, I do not see any reason why a jury should disagree in the matter, * * * although I do not care to force any man, against his conscience, to agree to a verdict which he does not believe in. * * * Feeling as I do about the case, * * * I do not feel that I should discharge you,"—since such remark was calculated to impress on the jury that the verdict should be one of guilty.—*Id.*

Expression of Opinion On the Weight of the Evidence.

22. The trial court has no right—except when advising an acquittal—to give, either in direct language or by implication, any expression of its opinion upon the weight of the evidence and the guilt of the defendant.—*Id.*

INTERVENTION.

See MINES AND MINING, 23.

JUDGMENTS.

As to restraining by injunction the enforcement of a conditional judgment, see INJUNCTION, 3.

JUDGMENT ON THE PLEADINGS.**When Proper.**

1. Judgment on the pleadings is proper when the complaint is sufficient, and none of its material allegations are denied, and no affirmative matter alleged to defeat the action.—*Montana Mining Co. v. St. Louis Mining & Milling Co.*, 311.

Proof to Determine the Amount of Damages.

2. *Obiter*: Where judgment is rendered on the pleadings, it is not necessary, under Code of Civil Procedure, Sections 754, 1020, for the trial court to hear proof to determine the amount of damages.—*Id.*

JURISDICTION.

As to State and Federal Courts, see COURTS.

Contracts Ousting Jurisdiction of Courts.

1. Civil Code 1895, Section 2245, making void provisions of contracts by which the jurisdiction of courts over controversies thereunder is ousted, does not apply to contracts made before its adoption.—*Cotter v. Grand Lodge A. O. U. W.*, 82.

Contracts Ousting Jurisdiction of Courts.

2. The common law doctrine, that a provision in an ordinary contract requiring all differences between the parties touching their rights and liabilities thereunder to be submitted to arbiters, whose decision shall be conclusive and final, will not be allowed to bar the litigation of such differences in the courts, is an anomaly, and inconsistent with the right freely to contract, and its operation should not be extended by construction, nor should it ever be invoked to nullify or impair contractual provisions not clearly infected with the supposed evils intended to be cured or prevented.—*Id.*

Appeals—Supreme Court.

3. The Supreme Court has no jurisdiction to entertain the appeal, where the appellant fails to file a proper undertaking on appeal.—*Washoe Copper Co. v. Hickey*, 319.

JURY.**Credibility of Witnesses.**

1. An instruction which authorizes a jury to disregard the entire uncorroborated testimony of a witness, in cases where it is "probable" that he has deliberately and intentionally testified falsely as to some material matter, is bad, as authorizing the jury to judge of the effect of evidence arbitrarily. Nor would the instruction be improved by use of the word "palpable," as the power of the jury would thereby be circumscribed by limiting their right to discard the testimony of a witness to those instances only where it is palpable the witness has testified falsely, and is not corroborated by other evidence.—*Cameron v. Wentworth*, 70.

Legal Discretion—Rules of Evidence.

2. *Obiter.* The power of a jury to form a judgment upon evidence is always confined within the exercise of legal discretion, and in subordination to the rules of evidence.—*Id.*

Credibility of Witnesses.

3. Code of Civil Procedure, Sec. 3390, Subd. 3, which provides "that a witness false in one part of his testimony is to be distrusted in others," requires the jury to distrust only a witness who willfully swears falsely as to material matters.—*Id.*

Verdict—"Willing Majority Should Rule."

4. Where jurors in a capital case agreed upon a verdict of guilty on the third ballot, to which all agreed, when polled, it will not be set aside because one of them stated in the jury room, before the informal ballot was taken, that he was "willing a majority should rule."—*State v. Brooks*, 146.

Instruction—Invading Province of Jury.

5. *Obiter:* It is the right of a jury to draw their own conclusions of fact from the evidence, and the court must avoid language which "virtually" decides facts, and withdraws their determination from the consideration of the jury.—*Butte & Boston Mining Co. v. Societe Anonyme d. M. d. L.*, 177.

Challenges—Waiver.

6. Where the state waived its fourth peremptory challenge, whereupon defendant exhausted his peremptory challenges, it was not error, on the panel's being filled and passed for cause, to permit the state to peremptorily challenge a juror who was in the box when the state waived its fourth challenge; since the state's waiver of its fourth challenge was not a waiver of any subsequent challenge it was entitled to.—*State v. Peel*, 358.

Equity Suit—Findings of Jury—Instructions.

7. Since findings of a jury in an equity suit are advisory merely, a judgment will not be reversed on appeal for the giving of erroneous instructions, where the court in making its findings of fact, approved some of those found by the jury, and made other findings, all the findings of the court being supported by the evidence.—*Haggin v. Saffie*, 375.

Misconduct—Evidence.

8. Where the affidavit of a member of the jury convicting accused of murder stated that the bailiff remained in the same room with the jury an entire night, within hearing of their discussions, and conversed with some of the jurors; and the bailiff's counter-affidavit stated that he entered the jury room about 1 a. m. to take the jury lunch and bedding, and thereafter slept just inside the door, at which time all but four of the jury had retired, and that he did not speak to any of the jurors about accused, and the case was not discussed in his hearing; and affidavits of other jurors showed that the bailiff did not mix with the jury, and took no part in the discussion of the case,—such affidavits showed no prejudicial misconduct of the jury towards defendant.—*State v. Pepo*, 473.

Misconduct—Prejudice—Presumption.

9. If misconduct of the jury, in a criminal case, be shown, tending to injure the defendant, prejudice is, presumed, but not absolutely.—*Id.*

Credibility of Witness.

10. A witness' credibility and the effect to be given his evidence are for the jury to determine.—*State v. Hurst*, 484.

Instruction as to Individual Duties of Juror.

11. Where a jury in a criminal case had been fully instructed as to their individual duties under the law, it was not error for the court to refuse to instruct that if, after

consideration of the whole case, any juror entertained any reasonable doubt of the guilt of the defendant, it was the duty of such juror not to vote for a verdict of guilty, nor to be influenced in so voting for the single reason that a majority of the jury were in favor of a verdict of guilty.—*Id.*

LEASE.

As to mining lease, see MINES AND MINING, 18, 19.

As to an appeal from an order directing an executor to execute a lease,
see APPEAL, 19, 20.

As to a particular contract held not to be a lease, see CONTRACTS, 16.

MANDAMUS.

To Compel a City to Pay a Bill.

1. *Mandamus* will lie to compel a city to audit and pay a bill which it owes to a water company for hydrant rent, although Political Code, Section 4708, provides that cities may sue or be sued in all courts and places.—*State ex rel. Kaiser Water Co. v. City of Phillipsburg*, 18.

To Compel a Judge to Settle a Statement or Bill.

2. Code Civil Procedure, Section 1157, and Supreme Court Rule 4, Subdivision 14, providing that where the judge refuses to settle a proposed statement to be used on motion for a new trial in accordance with the facts, the party aggrieved may apply to the Supreme Court for leave to prove such statement before a referee, or by deposition, does not apply to a refusal to settle the statement because of unreasonable delay, as the remedy in that case is by *mandamus*; or, *Semble*: Since the order was made after final judgment, the remedy by appeal might be resorted to.—*In re Application of Plume*, 41.

To Compel Governor to Perform a Ministerial Duty.

3. Constitution, Article IV, Section 1, prohibiting any one department of the state government from exercising any of the powers belonging to the other, does not prevent the courts from controlling by *mandamus* the exercise by the state executive of a purely ministerial duty.—*State ex rel. State Publishing Co. v. Smith*, 44.

Duty Involving Judicial Discretion cannot be Controlled by Writ.

4. Constitution, Article V, Section 30, provides that the state printing shall be done under contract, to be given to the lowest responsible bidder, under such regulations as may be prescribed by law, and that all such contracts shall be subject to the approval of the governor and state treasurer. Political Code, Sections 704-714, provides for the letting of the contract by a state board of examiners, of which the governor is made a member; Section 710 providing that all contracts made by the board must be approved by the governor and state treasurer. *Held*, that the duty of such officers to approve a contract let by the board is not ministerial, but involves judicial discretion, and cannot be controlled by *mandamus*.—*Id.*

To Compel Finance Committee A. O. U. W. to Act Upon a Claim.

5. *Semble*: The duty of the finance committee of a mutual benefit association to act upon a claim was a ministerial one, the performance of which, if refused or unreasonably delayed, could be compelled by *mandamus*.—*Cotter v. Grand Lodge A. O. U. W.*, 82.

To Compel a Trial Judge to Hear and Determine a Motion—Contempt.

6. A writ of mandate will not issue to a trial judge, commanding him to hear and determine an application to vacate an order appointing a receiver, where he makes it appear to the Supreme Court by his return that the movants are in contempt.—*Forrester & MacGinnis v. Boston & Mont. Consol. C. & S. M. Co.*, 122.

Issuance by Justices of the Supreme Court.

7. If it is necessary (under Section 1961 of the Code of Civil Procedure of 1895) that two Justices of the Supreme Court should concur in the issuance of an alternative writ of *mandamus*, where the application is made to two Justices, and the order directing the clerk to issue the writ is signed by only one of them, the other concurring, the writ is properly issued.—*State ex rel. Lambert v. Coad*, 131.

To Compel Auditing Officer to Recognize Void County Contract.

8. Where the action of a board of county commissioners is void for want of compliance with the law, *mandamus* will not be granted to compel recognition of it by the auditing officer whose duty it is to audit and pay the accounts of the county.—*Id.*

Disobedience of Writ—Contempt.

9. Where a court has jurisdiction of an application for *mandamus*, and authority to determine all questions presented by the application, the fact that it granted the relator more comprehensive relief than was warranted by the application is not a defense in contempt proceedings for failure to obey the mandate,—at least, so far as it related to matters contemplated by the application.—*State ex rel. Coad v. Judge, etc.*, 171.

Duty to Obey the Writ.

10. It is the duty of one to obey a writ of mandate, at all hazards, until the judgment awarding it can be reviewed and annulled on appeal.—*Id.*

To Compel a Judge to Grant a Change of Venue.

11. Refusal in the district court of a change of venue on the ground of residence is a judicial act, which by Code of Civil Procedure, Section 1742, may be reviewed on an appeal from the final judgment; and hence *mandamus* will not lie to compel a judge to grant a change on such ground, the remedy by appeal from the final judgment being plain, speedy, and adequate.—*State ex rel. Independent Pub. Co. v. Smith*, 229.

Province of the Writ.

12. *Mandamus* lies to coerce into activity, but not to direct the making of a particular judicial decision or ruling in a matter within the jurisdiction of the court or judge.—*Id.*

Mandamus to Court—Dissolution of Injunction.

13. A *mandamus* will not issue to compel a court to hear a motion to dissolve or modify an interlocutory injunction granted on order to show cause, based on the discovery of additional evidence tending to establish facts alleged in opposition to the injunction where the motion to modify is based upon the same facts and rests upon the same grounds as those which had been presented in opposition to the granting of the injunction, and where the privilege of applying for such dissolution or modification was not reserved in the order granting the injunction; such hearing being in the discretion of the court.—*State ex rel. Hickey v. Second Judicial District Court*, 564.

MINES AND MINING.

Notice of Location.

1. A notice of location of a mining claim, which, by reference to natural objects and monuments erected by the locator, contains directions which, taken in connection with such objects, would enable a person of ordinary intelligence to find the claim and trace its boundaries, is sufficient.

Obiter: Courts always construe these notices liberally.—*Bramlett v. Flick*, 35.

Identification of Claim—Question for Jury.

2. Whether or not a claim could be ascertained from such notice and the proof in regard to the surroundings, is for the jury.—*Id.*

Action to Determine Adverse Claims—Ownership—Evidence.

3. In an action to determine adverse claims to a mining claim, a notice of location which described a claim as being situated in a certain county, a certain distance from another claim, and defined by courses marked by substantial monuments, readily identified by marks thereon, taken in connection with evidence that the locator discovered gold-bearing quartz, and made a monument at the place of discovery, upon which he posted his notice of claim, shows *prima facie* ownership of such claim.—*Id.*

Ouster.

4. An entry upon the land of another under assertion of title is an ouster; intention guides the entry, and fixes its character.—*Id.*

Ouster.

5. Where one enters upon the mining claim of another under claim of title thereto, and mines thereon, and warns such other not to mine thereon, such conduct amounts to an ouster from the territory of the latter claimed by the former.—*Id.*

Claim Encroaching Upon Another—Boundaries—Evidence.

6. Where one mining claim encroaches upon another, it is not error to permit the engineer, who has made a plat thereof, to point out the exterior boundaries of the encroaching claim, as it tends to enlighten the jury as to the controversy.—*Id.*

Identification of Claim—Evidence.

7. A question as to whether a practical surveyor, familiar with the methods of locating claims, and familiar with surveys in mountainous countries and with the neighborhood, could take the description in a notice of location of a claim, and, starting at the point of discovery, find the claim described therein, is incompetent, as calling for an opinion.—*Id.*

Conflicting Claims—Boundaries—Evidence.

8. In an action to determine the boundaries of conflicting mining claims, evidence as to whether or not a surveyor found the boundaries of a claim without assistance, whether the blazing upon posts appeared to be old or new, and whether he could readily find the blazes on the trees along the boundaries, and whether they could be traced from one to another, relates to matters of fact, and is not open to the objection of being opinion evidence.—*Id.*

Discovery—Notice—Time in Which to Complete Location.

9. Under Compiled Statutes, Div. V, Sec. 1477, which provides that the discoverer of a mining claim shall have twenty days in which to complete the location and make the necessary record, a discoverer who posted in plain view a notice of location, and "claim of 1,500 feet on this lead, with twenty days for prospecting," if he made it in good faith, and with an intention to complete his location within the prescribed twenty days, thereby acquired a right to all the ground along the lead legitimately covered by his notice; and one locating thereon subsequently to such notice, and prior to the expiration of the twenty days, does not acquire a superior title, though he filed his statement and record within twenty days, and the former did not.—*Id.*

Notice of Location—Construction.

10. A notice, posted by the locator of a claim, that he claims 1,500 feet on the lode, will be construed to limit his claim to 750 feet along the lode on either side of the point of discovery.—*Id.*

Locator Including Within His Boundaries Ground Not Covered by his Notice.

11. The fact that a locator, after posting his notice, included within his boundaries ground not legitimately covered by his notice, if this was done in good faith as the result of ignorance or inadvertence merely, would not invalidate his claim, in so far as it includes what was legitimately covered by the notice.—*Id.*

Issuance by Justices of the Supreme Court.

7. If it is necessary (under Section 1361 of the Code of Civil Procedure of 1895) that two Justices of the Supreme Court should concur in the issuance of an alternative writ of *mandamus*, where the application is made to two Justices, and the order directing the clerk to issue the writ is signed by only one of them, the other concurring, the writ is properly issued.—*State ex rel. Lambert v. Coad*, 131.

To Compel Auditing Officer to Recognize Void County Contract.

8. Where the action of a board of county commissioners is void for want of compliance with the law, *mandamus* will not be granted to compel recognition of it by the auditing officer whose duty it is to audit and pay the accounts of the county.—*Id.*

Disobedience of Writ—Contempt.

9. Where a court has jurisdiction of an application for *mandamus*, and authority to determine all questions presented by the application, the fact that it granted the relator more comprehensive relief than was warranted by the application is not a defense in contempt proceedings for failure to obey the mandate,—at least, so far as it related to matters contemplated by the application.—*State ex rel. Coad v. Judge, etc.*, 171.

Duty to Obey the Writ.

10. It is the duty of one to obey a writ of mandate, at all hazards, until the judgment awarding it can be reviewed and annulled on appeal.—*Id.*

To Compel a Judge to Grant a Change of Venue.

11. Refusal in the district court of a change of venue on the ground of residence is a judicial act, which by Code of Civil Procedure, Section 1742, may be reviewed on an appeal from the final judgment; and hence *mandamus* will not lie to compel a judge to grant a change on such ground, the remedy by appeal from the final judgment being plain, speedy, and adequate.—*State ex rel. Independent Pub. Co. v. Smith*, 329.

Province of the Writ.

12. *Mandamus* lies to coerce into activity, but not to direct the making of a particular judicial decision or ruling in a matter within the jurisdiction of the court or judge.—*Id.*

Mandamus to Court—Dissolution of Injunction.

13. A *mandamus* will not issue to compel a court to hear a motion to dissolve or modify an interlocutory injunction granted on order to show cause, based on the discovery of additional evidence tending to establish facts alleged in opposition to the injunction where the motion to modify is based upon the same facts and rests upon the same grounds as those which had been presented in opposition to the granting of the injunction, and where the privilege of applying for such dissolution or modification was not reserved in the order granting the injunction; such hearing being in the discretion of the court.—*State ex rel. Hickey v. Second Judicial District Court*, 564.

MINES AND MINING.

Notice of Location.

1. A notice of location of a mining claim, which, by reference to natural objects and monuments erected by the locator, contains directions which, taken in connection with such objects, would enable a person of ordinary intelligence to find the claim and trace its boundaries, is sufficient.

Obiter: Courts always construe these notices liberally.—*Bramlett v. Flick*, 95.

Identification of Claim—Question for Jury.

2. Whether or not a claim could be ascertained from such notice and the proof in regard to the surroundings, is for the jury.—*Id.*

Action to Determine Adverse Claims—Ownership—Evidence.

3. In an action to determine adverse claims to a mining claim, a notice of location which described a claim as being situated in a certain county, a certain distance from another claim, and defined by courses marked by substantial monuments, readily identified by marks thereon, taken in connection with evidence that the locator discovered gold-bearing quartz, and made a monument at the place of discovery, upon which he posted his notice of claim, shows *prima facie* ownership of such claim.—*Id.*

Ouster.

4. An entry upon the land of another under assertion of title is an ouster; intention guides the entry, and fixes its character.—*Id.*

Ouster.

5. Where one enters upon the mining claim of another under claim of title thereto, and mines thereon, and warns such other not to mine thereon, such conduct amounts to an ouster from the territory of the latter claimed by the former.—*Id.*

Claim Encroaching Upon Another—Boundaries—Evidence.

6. Where one mining claim encroaches upon another, it is not error to permit the engineer, who has made a plat thereof, to point out the exterior boundaries of the encroaching claim, as it tends to enlighten the jury as to the controversy.—*Id.*

Identification of Claim—Evidence.

7. A question as to whether a practical surveyor, familiar with the methods of locating claims, and familiar with surveys in mountainous countries and with the neighborhood, could take the description in a notice of location of a claim, and, starting at the point of discovery, find the claim described therein, is incompetent, as calling for an opinion.—*Id.*

Conflicting Claims—Boundaries—Evidence.

8. In an action to determine the boundaries of conflicting mining claims, evidence as to whether or not a surveyor found the boundaries of a claim without assistance, whether the blazing upon posts appeared to be old or new, and whether he could readily find the blazes on the trees along the boundaries, and whether they could be traced from one to another, relates to matters of fact, and is not open to the objection of being opinion evidence.—*Id.*

Discovery—Notice—Time in Which to Complete Location.

9. Under Compiled Statutes, Div. V, Sec. 1477, which provides that the discoverer of a mining claim shall have twenty days in which to complete the location and make the necessary record, a discoverer who posted in plain view a notice of location, and "claim of 1,500 feet on this lead, with twenty days for prospecting." If he made it in good faith, and with an intention to complete his location within the prescribed twenty days, thereby acquired a right to all the ground along the lead legitimately covered by his notice; and one locating thereon subsequently to such notice, and prior to the expiration of the twenty days, does not acquire a superior title, though he filed his statement and record within twenty days, and the former did not.—*Id.*

Notice of Location—Construction.

10. A notice, posted by the locator of a claim, that he claims 1,500 feet on the lode, will be construed to limit his claim to 750 feet along the lode on either side of the point of discovery.—*Id.*

Locator Including Within His Boundaries Ground Not Covered by His Notice.

11. The fact that a locator, after posting his notice, included within his boundaries ground not legitimately covered by his notice, if this was done in good faith as the result of ignorance or inadvertence merely, would not invalidate his claim, in so far as it includes what was legitimately covered by the notice.—*Id.*

Vein—Continuity—Identity.

12. In order that a vein may be followed extralaterally, identity throughout is essential, and the vein must be continuous; but the continuity may be interrupted, provided the interruption does not prevent the tracing of the vein through the fissure as geologically identical.—*Butte & Boston Mining Co. v. Societe Anonyme d. M. d. L.*, 177.

Vein—Continuity—Identity—Question of Fact for Jury.

13. *Obiter*: It is a question of fact, to be decided by the jury subject to general rules, whether there is that essential identity and continuity by which the vein can be traced through the surrounding rocks.—*Id.*

Vein—Identity—Instruction.

14. Where the court, in a charge, has correctly defined a vein, and indicated that, in order that a vein may be followed extralaterally, it must be the identical vein throughout, it is not error to place stress on the physical continuity, and to neglect to charge as fully in regard to the other elements of identity, when no charge is requested.—*Id.*

Vein—Continuity—Instruction.

15. A charge that veins are permanently separated, and cannot be followed as the same vein, when, in order to connect them, it is necessary to pass through a considerable distance of rock showing no elements of a vein, where there are neither minerals, walls nor seams, is not erroneous, as being practically a charge that the jury must reach a certain conclusion as to the continuity of the vein.—*Id.*

Vein—Identity—Instruction.

16. In a charge that, if no evidence of a vein appear for any considerable distance, the veins are not identical, the use of the word "considerable" is not objectionable as being indefinite.—*Id.*

Purchaser of a Portion of a Mining Claim—Right to Follow Vein.

17. *Quære*: Whether, under the conditions as presented herein, the purchaser of a portion of a mining claim must follow along a plane of the end line of the claim drawn down at the point of departure of the vein from the conveyed premises, or must follow the plane of the end line of the conveyed premises which may cross the vein.—*Id.*

Lease of Mining Property—"Net Proceeds."

18. The lessees of a mine agreed with plaintiff's assignor to operate the mine, in consideration of plaintiff's assignor furnishing all necessary supplies, the net proceeds of the ore, after milling, to be equally divided between the lessees and plaintiff's assignor. *Held*, that in determining the net proceeds, only the cost of smelting, and not the costs of mining, hoisting and handling the ore, should be deducted from the gross proceeds.—*Yank v. Bordeaux*, 205.

Purchase of Ore From Lessee—Forfeiture of Lease.

19. Where plaintiff purchased ore of one who obtained it of the lessees of a mine, his title was not affected by a forfeiture of the lease after the ore had been mined, in the absence of evidence that such forfeiture carried with it the right to ore previously mined.—*Id.*

Declaratory Statement—Location—Description.

20. Political Code, Section 3612, providing that the declaratory statement containing a description of a mining claim filed with the county clerk must contain the location and description of each corner, with the markings thereon, is mandatory, and a compliance with its provisions is necessary to perfect a valid location, hence a statement describing a claim by meets and bounds, and giving no description of the corners or the markings thereon, is invalid.—*Purdum v. Laddin*, 387.

"Mining Claims"—Placer Ground—Adverse Possession—Statute of Limitation.

21. Code of Civil Procedure 1895, Section 494 (Compiled Statutes 1887, First Division, Section 40), providing that no action for the recovery of mining claims, lode claims excepted, or for the recovery of possession thereof, shall be maintained, unless it appears that the plaintiff or his assigns was seized or possessed of such mining claims within one year before the commencement of such action, is not applicable to real estate patented as placer ground, and hence adverse possession of such land for one year after the issuance of the patent is not sufficient to divest the owner of title, and such adverse possession does not bar an action for its recovery.—*Horst v. Shea*, 890.

Suit to Establish Adverse Claim—Intervention.

22. Revised Statutes U. S. Section 2326, and Act Congress March 3, 1881, amendatory thereof, allow 60 days from the filing of an application for a patent to a mining claim for the filing of adverse claims, and requires suits to establish such adverse claims to be brought within 30 days thereafter. Code Civil Procedure 1895, Section 1822, provides that it is sufficient to confer jurisdiction upon the court, in an action to establish an adverse claim for a patent to a mining location, if it appears from the pleadings that the application for the patent had been made, and the adverse claim filed and allowed in the proper land office. *Held*, that one who has not filed his adverse claim under the statute cannot intervene in an action to determine adverse claims to a location, though he claims an interest in the premises adverse to both plaintiff and defendant.—*Murray v. Polglase*, 401.

Receiver's Receipt—Fraud—Annual Representation Work.

23. An entryman of a mining claim, who makes final entry thereof, and obtains the receiver's receipt therefor, showing he is entitled to a patent, is not relieved of the necessity of doing the annual representation work where such receipt was obtained by fraud.—*Id.*

Receiver's Receipt—Cancellation.

24. The cancellation, by the authorities of the land office, of a receiver's receipt, adjudicates the fact that the entryman obtained no title at all by his entry, and by such act of the land office the entryman is deprived of the ability to claim any right under said receipt.—*Id.*

Receiver's Receipt—Cancellation for Fraud—Relocation of Claim.

25. Where a receiver's receipt, showing that the entryman of a mining claim is entitled to the patent, is subsequently annulled for fraud practiced in obtaining it, and the entryman has failed to do the annual representation work, the claim is subject to relocation.—*Id.*

Receiver's Receipt—Cancellation—Adverse Location—Evidence.

26. Where a receiver's receipt, under which plaintiff is seeking to establish an adverse claim to a mining location, is shown to have been canceled, evidence of defendant's adverse location and publication of notice are admissible in evidence.—*Id.*

Law Requiring Safety Mining Cages—Evidence.

27. In a prosecution for violation of the Laws of 1897, p. 245, making it unlawful for a corporation to work through a vertical shaft where mining cages are used to a greater depth than 300 feet, unless the cage shall be provided with an iron-bonneted safety cage, evidence that such devices or cages would be dangerous is inadmissible, since the question whether such appliances were the best or wisest method is for the legislature to decide.—*State v. Anaconda Copper Mining Co.*, 498.

MUNICIPAL CORPORATIONS.**Water Company—Contract with City.**

1. Under a contract by a city with a water company by which the latter has to furnish and keep in working order 15 fire hydrants for a period of 10 years at a rental of \$112 per annum, the city to have the right at any time within 10 years "to take any

additional number of fire hydrants at the annual rental of one hundred dollars each," the city, ordering additional hydrants, is liable for their rent for the remainder of the period of ten years, and not merely until the order is rescinded.—*State ex rel. Kater Water Co. v. City of Phillipsburg*, 16.

Mandamus to Compel a City to Pay a Bill.

2. *Mandamus* will lie to compel a city to audit and pay a bill which it owes to a water company for hydrant rent, although Political Code, Section 4708, provides that cities may sue or be sued in all courts and places.—*Id.*

Alderman—Illegal Contract with City—Defense.

3. That an alderman made an illegal contract with a city to construct a sewer is no defense to his contract to indemnify a third person for his payment of debts incurred in its construction, and expenses in excess of the stipulated price in completing the sewer according to contract.—*Gallagher v. Cornelius*, 27.

Qualification of Alderman—Statutory Construction.

4. In view of Political Code, Section 5100, adopted February 25, 1895, providing that laws passed at the session of the legislative assembly at which the Code was passed must be construed as if both had been passed on the last day thereof, and Section 2, providing that the Code shall not take effect until July 1, 1895, Compiled Statutes 1887, Div. V, Section 365, relating to the qualification of aldermen, could not have been repealed or abrogated by the Code before July 1, 1895, and hence the act of March 7, 1895 (Political Code, Section 4758), amending it, was a valid amendment of an existing law, and became, under the act of March 13, 1895 (Political Code, Section 5180 *et seq.*), effective as a part of the Code on and after July 1, 1895.—*Dowdy v. Pittwood*, 113.

Qualifications of Mayors and Aldermen—Constitutional Law

5. The act of March 7, 1895, entitled "An act to amend Sections 364 and 365 of the Fifth Division of the Compiled Statutes of Montana, and the amendments thereto, approved September 14, 1887, relating to the qualifications of mayors and aldermen and declaring the same," does not conflict with Constitution, Art. V, Section 23, declaring that an act shall not embrace more than one subject, which shall be clearly expressed in its title.—*Id.*

Qualifications of Mayors and Aldermen—Constitutional Law.

6. The act does not violate Constitution, Article V, Section 23, providing that no law shall be revised, amended or extended by reference to its title only; but so much as is revised, amended or extended shall be re-enacted and published at length.—*Id.*

Qualification of Alderman—Residence in Ward.

7. Political Code, Section 4753, providing that no person shall be eligible to the office of alderman, unless a resident of the ward where elected "for at least one year preceding such election," means one year next preceding the election.—*Id.*

Contracts—Lowest Bidder, Etc.

8. It is the general rule that, when the authorities of a municipality are required by statute to let contracts to the lowest bidder, a contract not so awarded is illegal; and if notice, advertising, and similar preliminaries are required, a contract entered into without such preliminaries will be held invalid.—*State ex rel. Lambert v. Coad*, 131.

MUTUAL BENEFIT ASSOCIATIONS.

Constitution and By-Laws—Validity.

1. The laws of a voluntary mutual benefit society required a claimant, whenever any claim under a beneficiary certificate shall be rejected by its grand master and finance committee, before any other proceedings shall be had thereunder, to demand a hearing and offer to submit his claim to its board of arbitration, and if dissatisfied with

the conclusions of said board, he must, by appeal, submit his claim to the grand lodge, and if dissatisfied with the action of the grand lodge, he must, by appeal, submit his claim to the supreme lodge, and without such submission and appeal said claimant shall be estopped by virtue thereof from maintaining any suit or action upon such claim.

Held: That such provisions are valid and enforceable so far as they require, as a condition precedent to the bringing of an action at law to recover a money judgment upon a death claim, an exhaustion of the prescribed remedies within the order.—*Cotter v. Grand Lodge, A. O. U. W., 82.*

Members Bound by the Laws.

2. *Semble:* Members of, and those claiming benefits from, mutual benefit societies are bound, in the absence of fraud or palpable error, to seek redress of their grievances in the mode prescribed by the society, wherein vests the sole jurisdiction to right their wrongs, and are precluded from resort to the courts.—*Id.*

Beneficiary of Deceased Member Bound by the Laws.

3. The constitution and by-laws of a mutual benefit society are binding on the beneficiary of a deceased member.—*Id.*

Grand Master Workman—Finance Committee.

4. The laws of a mutual benefit society provided, that when a death claim "shall be rejected by the grand master workman and finance committee of this grand lodge," the claimant must, before taking any other proceeding, demand a hearing and submit his claim for the consideration of the board of arbitration. *Held,* that, in view of other provisions of the law referred to in the opinion, the copulative "and" between "grand master workman" and "finance committee" should be read as if it were the disjunctive "or," and that a rejection of a claim by either the grand master workman or by the finance committee is effectual, and that the grand master workman has nothing whatever to do in the matter of approving or disapproving a death claim when the finance committee has rejected it; it is only when the finance committee approves a claim that the power to reject is confided to the grand master workman.—*Id.*

Finance Committee—Mandamus.

5. *Semble:* The duty of the finance committee to act, upon the claim, was a ministerial one, the performance of which, if refused or unreasonably delayed, could be compelled by mandamus.—*Id.*

Finance Committee—Rejection of Claim.

6. The finance committee of the state lodge of a mutual benefit society reported, in writing, on a claim submitted to it, that the records showed a prior suspension of the member in question, and there was no report from the subordinate lodge as to his standing since then, and therefore there was nothing before the committee on which it could act. The committee then orally rejected the claim, and the written report of the committee, together with the fact that it had rejected the claim, was communicated to the subordinate lodge which had presented the claim to the state organization. *Held,* a rejection of the claim, within a by-law of the society requiring such claim, on its rejection, to be submitted to arbitration.—*Id.*

NEW TRIAL.

Evidence Insufficient to Justify Verdict.

1. The Supreme Court will not disturb the action of a trial judge in setting aside a verdict, where he is satisfied that it is not warranted by the evidence.—*Patten v. Hyde, 23.*

Specifications as to Insufficiency of Evidence.

2. Specifications are sufficient to point out the particulars in which evidence is claimed to be insufficient to justify a verdict, which give the opposite party notice, and advise the court in plain language of the matters that would be urged on the hearing.—*Id.*

Specification of Errors of Law.

3. Errors of law on appeal from an order refusing a new trial cannot be reviewed where a specification of such errors was omitted from the statement of the case on the motion therefor.—*Gallagher v. Cornelius*, 27.

Refusal to Settle Statement—Application to Supreme Court.

4. Code Civil Procedure, Section 1157, and Supreme Court Rule 4, Subdivision 14, providing that where the judge refuses to settle a proposed statement to be used on motion for a new trial in accordance with the facts the party aggrieved may apply to the Supreme Court for leave to prove such statement before a referee, or by deposition, does not apply to a refusal to settle the statement because of unreasonable delay, as the remedy in that case is by *mandamus*; or, *Semble*: Since the order was made after final judgment, the remedy by appeal might be resorted to.—*In re Application of Plume*, 41.

Newly Discovered Evidence.

5. A new trial will not be granted for newly discovered evidence which is cumulative merely.—*State v. Brooks*, 146.

Appeal—Conflict of Evidence.

6. Where the court sustained a motion for a new trial, and did not expressly exclude the ground that the verdict was against the evidence, the ruling will be sustained on appeal, where there appears to be a conflict of evidence.—*Butte & Boston Mining Co. v. Societe Anonyme d. M. d. L.*, 177.

Appeal—Conflict of Evidence—Discretion of Trial Judge.

7. The Supreme Court will not disturb the discretion of the trial court in granting a new trial, on the ground that the evidence was insufficient to sustain the verdict, where the record discloses a substantial conflict as to material matters.—*O'Rourke et al. v. Sherman*, 310.

Denying Motion for New Trial—Presumption.

8. The trial court is presumed to have acted legally in denying motion for a new trial, and to have based on a proper foundation its decision that the evidence was sufficient to sustain the conviction.—*State v. Sheppard*, 323.

Refusal to Grant a New Trial—Conflict of Evidence—Review.

9. Refusal to grant a new trial of a criminal case for insufficiency of evidence will not be disturbed on appeal where the evidence was conflicting, and tended to support the verdict.—*State v. Hurst*, 484.

Information Not Properly Subscribed—Error.

10. It is error, in a criminal case, to grant defendant's motion for a new trial on the ground that the information therein is not properly subscribed.—*State v. Schneyer*, 523.

Discretionary Power of Trial Court—Review.

11. The rule that the trial court's action in granting a new trial cannot be disturbed, even if it committed errors during the course of the trial, because such action was discretionary, applies only when the motion is made upon grounds which appeal to the discretionary power of the court, hence does not apply where the motion was made upon assignments of errors in law only.—*Id.*

NONSUIT.

Action of Conversion.

1. Evidence reviewed in an action of conversion, and held, not to justify the granting of a nonsuit.—*Reynolds v. Fitzpatrick*, 52.

Mining Claims.

2. Evidence reviewed in an action to determine adverse claims to a mining claim, and held, not to justify the granting of a nonsuit.—*Bramlett v. Flick*, 95.

Appeal—Review—Bill of Exceptions.

3. Error in granting a nonsuit cannot be considered when there is no bill of exceptions.—*Harding v. McLaughlin*, 334.

OFFICERS.

As to controlling by *mandamus* the action of public officers, see **MANDAMUS**.

As to an Act of the legislature increasing or diminishing compensation, see **CONSTITUTION**, 3, 4, 5, 6.

As to compensation of deputy county attorneys, see **DEPUTY COUNTY ATTORNEYS**, 12.

OUSTER.

As to what amounts to an ouster from a mining claim, see **MINES AND MINING**, 4, 5.

PARTNERSHIP.

Assets—Creditors.

1. The principle that the assets of a partnership are for distribution to their creditors does not obtain without regard to rights already existing.—*Noyes v. Ross*, 425.

Partnership Property—Firm Creditors—Mortgage Creditors.

2. The right to have partnership property first applied to partnership debts is one primarily for the benefit of the partners, and if they waive such right, firm creditors cannot invoke it to secure preferences over mortgage creditors.—*Id.*

PLEADING (CIVIL).

Conversion—Allegations of Complaint.

1. A complaint in an action for conversion, which avers that plaintiff is the owner of the property described, states its value, and the acts of defendant which deprive him thereof, and asks damages, is sufficient, and need not aver that defendant did any wrong.—*Reynolds v. Fitzpatrick*, 52.

Conversion—Allegation and Proof of Demand.

2. In an action for the conversion, where the taking is wrongful, it is not necessary to allege a demand before the commencement of the action.—*Id.*

Replevin—Right to Immediate Possession.

3. To maintain an action in claim and delivery, plaintiff must plead and prove his right to the immediate possession of the property at the time of the commencement of the action. Allegations of these essential facts may be by stating the particular facts which entitle plaintiff to immediate possession.—*Cameron v. Wentworth*, 70.

Disbarment Proceedings—Verification of Accusation.

4. Under Code of Civil Procedure, Section 420, providing that an accusation must be verified by an oath that the charges therein are true, an accusation in disbarment proceedings wherein some of the charges are verified only on information and belief, and others are positively sworn to, is partially valid, and will stand against an objection aimed at the entire accusation.—*In re Welcome*, 213.

Action to Enjoin Sale For Taxes—Allegations of Complaint.

5. In an action to restrain by injunction the collection of a tax alleged to have been irregularly and illegally assessed, a complaint which fails to show that plaintiff attempted to have the irregularity complained of corrected by application to the board

of equalization, and does not allege any excuse for not doing so, is bad on demurrer.—*Deloughrey v. Hinds*, 280.

Action to Enjoin Sale For Taxes—Allegations of Complaint.

6. Under Laws of 1889, page 219, Section 4, which makes it the duty of a taxpayer to furnish the assessor a list of property owned by him, and Section 5, which makes it the duty of the assessor to assess each lot separately, where the complaint, in an action to enjoin the sale for taxes of one of several separate lots assessed in gross, alleges that complainant is the owner of the lot, but fails to show whether or not the complainant owned all of them at the time the assessment was made, and does not attack the assessment on any ground other than such assessment in gross, it will be presumed that he was either the owner of the several lots when the assessment was made, or that he purchased the lot since the assessment. In the former case he is not entitled to relief, as it is his duty to pay taxes on all the lots; and in the latter he cannot complain, as he took subject to the burdens.—*Id.*

Action to Enjoin Sale for Taxes—Allegations of Complaint.

7. In an action to restrain by injunction the collection of a tax alleged to have been irregularly assessed, a complaint which alleges that plaintiff "is" the owner of the lot in question, but fails to make tender of the amount of taxes admittedly just and due to the county and state, is bad on demurrer.—*Id.*

Action on Injunction Bond—Complaint—Answer.

8. In an action in a state court on an injunction bond given in a federal court, conditioned to pay damages "if the court should finally determine that plaintiff was not entitled thereto," the complaint alleged a final determination of the injunction suit by a judgment dismissing the cause. The answer alleged, by way of avoidance, that a suit was pending in the federal court, involving the title to the property in controversy, but it did not allege that plaintiffs or defendants were interested therein. It also alleged that a suit by plaintiffs in the state court to determine the right to the property was also pending, but it did not allege that defendants had any interest in said suit. Held, that the answer did not show that the action was prematurely brought.—*Montana Mining Co. v. St. Louis Mining & Milling Co.*, 311.

Judgment on the Pleadings.

9. Judgment on the pleadings is proper when the complaint is sufficient, and none of its material allegations are denied, and no affirmative matter alleged to defeat the action.—*Montana Mining Co. v. St. Louis Mining & Milling Co.*, 311.

Intermingling in One Count of Several Causes of Action.

10. The objections urged at the trial to the reception of evidence under a complaint were, that one of the causes alleged in it arose *ex delicto*, whereas the other arose *ex contractu*, and was not separately stated and numbered: Held, that a motion to exclude evidence, or an objection to receive it, is not the remedy for the intermingling in one count of several causes of action.—*Bandman v. Davis*, 382.

Complaint—Causes of Action Improperly United—Demurrer.

11. A demurrer is the only remedy by which a complaint may be attacked upon the ground that causes of action are improperly united therein.—*Id.*

Action to Establish an Adverse Claim to a Mining Location.

12. In an action to establish an adverse claim to a mining location the pleadings must contain allegations showing that the court has jurisdiction to proceed with the case.—*Murray v. Polglase*, 401.

Foreign Corporations—Compliance with Domestic Statutes.

13. Since it is unnecessary for a foreign corporation plaintiff, bringing action on a domestic contract, to allege in its complaint that it complied with the statutes of the state entitling it to do business therein, the question of its noncompliance therewith can only be raised by answer.—*American Hand-Sewed Shoe Co. v. O'Rourke*, 530.

PLEADING AND PRACTICE (Criminal).

See CRIMINAL LAW, 35.

Information—Indorsement of the Names of Witnesses.

1. Under Penal Code of 1895, Section 1734, requiring the county attorney to indorse on the information, at the time of its filing, the names of the witnesses then known to him, where the name of a witness known to the county attorney at the filing of the information was omitted, but there was no evidence of bad faith, the court properly permitted it to be indorsed the day before trial.—*State v. Calder*, 504.

Information—Indorsement of the Names of Witnesses.

2. Under Penal Code, Section 1734, requiring the county attorney to indorse on the information, on filing it, the names of the witnesses for the state, if known, but not providing for the indorsement of other witnesses thereafter discovered, the act of the attorney at the trial in indorsing, under the directions of the court, the names of other witnesses on the information is not error, as such witnesses were subject to be examined whether their names were indorsed on the information or not.—*State v. Schnepel*, 523.

POLICE POWER.

See STATE, 2.

PRESUMPTIONS.

As to the presumption of innocence, see CRIMINAL LAW, 1, 2.

ATTORNEY, 17.

As to the presumption that a finding is supported by the weight of the evidence, where there is a substantial conflict in the testimony, see APPEAL, 11.

As to the presumption that every transfer of personal property is fraudulent, if not accompanied by change of possession, see FRAUDULENT SALES, 1.

As to the presumption that the trial court has acted legally in denying motion for a new trial, see NEW TRIAL, 8.

As to presumption of sanity, see CRIMINAL LAW, 16.

As to prejudice from misconduct of jury, see JURY, 9.

As to presumption that the trial court has acted without error, see TRIAL, 10.

As to presumption of assent from silence, see INSTRUCTIONS, 15.

As to assessment and valuation of property, see TAXATION, 15.

PRINCIPAL AND AGENT.

Chattel Mortgage—Mortgagor—Mortgagee.

A chattel mortgagor in possession—under an agreement with the mortgagee to sell for the latter's benefit, and to account, and to reserve nothing beyond what is actually necessary to carry on the business and live upon—is not an agent in fact, inasmuch as he is, until his rights are foreclosed, the owner of the stock mortgaged; but, so far as the rights of third persons who are creditors are concerned, he occupies a relationship towards the mortgagee which binds the mortgagee to treat as cash all credit sales and to apply such on the debt secured by the mortgage, and to this extent he may well be regarded as the agent of the mortgagee in making the sales and in receiving the purchase price.—*Noyes v. Ross*, 425.

PROBATE PROCEEDINGS.

As to appeals from judgments and orders in probate proceedings, see APPEAL, 18, 19, 20.

PUBLIC LANDS.

Bona Fide Entryman—Equitable Owner.

When an entryman has complied with the law in good faith, and has been recog-

nized by the government as a purchaser of its land and holds the evidence of his purchase, he is, as to the government and third persons, the equitable owner thereof, and is liable to pay taxes on it, the same as upon his other property.—*Murray v. Polglase*, 401.

PUBLIC POLICY.

See BANKS AND BANKING, 1.
CONTRACTS, 11.

PUBLIC PRINTING.

Approval of Public Printing Contract—*Mandamus*.

Constitution, Article V., Section 30, provides that the state printing shall be done under contract, to be given to the lowest responsible bidder, under such regulations as may be prescribed by law, and that all such contracts shall be subject to the approval of the governor and state treasurer. Political Code, Sections 704-714, provide for the letting of the contract by the State Board of Examiners, of which the governor is made a member; Section 710 providing that all contracts made by the board must be approved by the governor and state treasurer. *Held*, that the duty of such officers to approve a contract let by the board is not ministerial, but involves judicial discretion, and cannot be controlled by *mandamus*.—*State ex rel. State Publishing Co., v. Smith*, 44.

RECEIVERS.

See CONTEMPT, 1, 2.

REFEREES.

Request for Findings.

1. Where it does not appear from the record that appellant requested findings in writing by a referee, as required by Code Civil Procedure, Section 1114, as a condition to reversal for want of findings, he cannot complain of the referee's failure to make findings.—*Gallagher v. Cornelius*, 27.

Objections and Exceptions to Findings.

2. Unless objections and exceptions to findings of a referee, for defects therein, are settled in a bill or statement, as required by Code Civil Procedure, Section 1115, they are not properly a part of the transcript on appeal, and will not be considered.—*Id.*

RELEASE.

See BANKS AND BANKING, 1, 2.
SURETIES, 5.

REPLEVIN.

Pleading—Right to Immediate Possession.

To maintain an action in claim and delivery, plaintiff must plead and prove his right to the immediate possession of the property at the time of the commencement of the action. Allegations of these essential facts may be by stating the particular facts which entitle plaintiff to immediate possession.—*Cameron v. Wentworth*, 70.

RULES OF SUPREME COURT.

As to application to Supreme Court for leave to prove exceptions in accordance with the facts, see BILL OF EXCEPTIONS, 1, 2, 9, 10, 11.

Defective Brief—Dismissal of Appeal.

1. Where the brief of defendant does not contain specifications of errors, nor abstract, nor statement of the case, as required by the Supreme Court, Rule V, Subdivision 3, the appeal will be dismissed.—*Anderson v. Carlson*, 43.

Defective Brief—Dismissal of Appeal.

2. A brief filed by appellant, which does not, in the statement of the case, make appropriate references to the transcript, showing where therein evidence of witnesses or pleadings are to be found, or which does not specify errors complained of in accordance with Supreme Court Rule V, is so defective as to justify the court in dismissing the appeal.

Obiter: In the future, the failure of the appellant to meet every requirement of the rules of the Supreme Court touching briefs will be sufficient cause for dismissal of the appeal.—*Smith v. Donntff*, 65.

Defective Brief—Instructions—Failure to Specify Error.

3. A failure to comply with Subdivision 3 of Rule V of the Supreme Court, providing that, when the error alleged is to the charge of the Court, the specification shall set out *totidem verbis* the part referred to, whether it be instructions given or instructions refused, is sufficient warrant for refusing an examination of the charge on appeal.—*State v. Allen*, 118.

Defective Brief—Specification of Errors.

4. A failure to comply with Supreme Court Rule V, regulating the form of appellant's brief, will warrant a refusal to consider specifications of error.—*State v. Shepphard*, 323.

SALES.

Contract—Assignment *Pendente Lite*.

Where a contract provided that, if the purchaser of property should become dissatisfied, she should be entitled to a return of the purchase price on surrender of the property sold, the fact that pending the suit to enforce such agreement she assigned the contract is immaterial, since Code of Civil Procedure, Section 22, (Compiled Statutes 1887), authorizes the continuance of a suit in the name of the original party, or substitution of the transferee, where plaintiff's claim is transferred *pendente lite*.—*O'Rourke v. Schultz*, 285.

STARE DECISIS.

Rule—When Observed.

The rule of *stare decisis* will be observed where it is apparent that no substantial injury or injustice will result therefrom.—*Deloughrey v. Hinds*, 280.

STATE.

Contracts.

1. Before a contract can become valid and binding upon the state, the statutory formalities must be complied with.—*State ex rel. Lambert v. Coad*, 131.

Police Power.

2. The legislature is the branch of the government which exercises the police power of the state, and, unless there be constitutional limitations upon it, as a rule the judicial power cannot set aside a law passed in the exercise of it.—*State v. Anaconda Copper Mining Co.*, 498.

STATUTE OF LIMITATIONS.

See MINES AND MINING, 21.

SURETIES, 1.

STATUTES.

(List of Statutes of Montana Cited or Construed.)

REVISED STATUTES OF 1879.

Sec. 40 (Fourth Division).....	374
Sec. 873, p. 590.....	390

LAWS OF 1883.

P. 85 (Placer Locations).....	296
-------------------------------	-----

COMPILED STATUTES OF 1887.
First Division (Code of Civil Procedure.)

Sec. 1.....	40
Sec. 4.....	39
Sec. 22.....	294
Sec. 32.....	394, 398
Sec. 40.....	393, 394, 398, 399
Sec. 348.....	3, 8
Sec. 421.....	28, 307, 308
Sec. 539.....	284

FIFTH DIVISION (General Laws.)

Sec. 207.....	284
Sec. 208.....	284
Sec. 345.....	30
Sec. 365.....	115-117
Sec. 375.....	30
Sec. 442.....	275, 277, 281, 284
Sec. 443.....	275, 277
Sec. 444.....	278, 281
Sec. 445.....	281
Sec. 446 <i>et seq.</i>	282
Sec. 1477.....	111, 390
Sec. 1540.....	440
Sec. 1905.....	238, 243

LAWS OF EXTRA SESSION OF 1887.

P. 61 (Municipal Corporations).....	115
P. 82 (Taxation).....	398
P. 99 (Taxation).....	348

LAWS OF 1889.

P. 219 (Taxation).....	268
------------------------	-----

LAWS OF 1891.

P. 78 <i>et seq.</i> (Taxation).....	348, 349
P. 75 (Taxation).....	271
P. 235 (Compensation of Deputies).....	355
P. 237 (Compensation of Deputies).....	353
P. 250 (Information).....	505

LAWS OF 1893.

P. 80 (Compensation of Deputies).....	353, 355
P. 91 (Foreign Corporations).....	277

CODES OF 1895.
(Political Code.)

Sec. 2.....	117
Sec. 17.....	115-117
Sec. 292.....	116
Secs. 704-714.....	50
Secs. 1510-2028.....	243
Sec. 1940.....	236-249
Sec. 1940b.....	236-249
Sec. 1941.....	236-244
Sec. 2759.....	253

Sec. 3610.....	111
Sec. 3611.....	111-389
Sec. 3612.....	111-389
Sec. 3613.....	389
Sec. 3670-4083.....	242
Sec. 3690.....	562
Sec. 3700.....	349, 562
Sec. 3724.....	242, 562
Sec. 3780.....	562
Sec. 3781.....	62
Sec. 3788.....	562
Sec. 3783.....	562
Sec. 3784.....	562
Sec. 3785.....	562
Sec. 3916.....	349
Sec. 3922.....	350
Sec. 3923.....	350
Sec. 4014.....	349
Sec. 4017.....	350
Sec. 4023.....	272, 349
Sec. 4024.....	272, 350
Sec. 4025.....	272, 350
Sec. 4026.....	272, 349, 350
Secs. 4166-4172.....	139
Sec. 4190.....	137
Sec. 4230.....	137
Sec. 4312.....	252
Sec. 4594.....	356
Sec. 4596.....	352, 354, 355, 356
Sec. 4597.....	356
Sec. 4602.....	354, 356
Sec. 4603.....	354, 356
Sec. 4639.....	253
Sec. 4703.....	22
Sec. 4722.....	118
Sec. 4752.....	116, 118
Sec. 4753.....	115, 116, 117, 118
Sec. 4755.....	118
Sec. 5160.....	116
Sec. 5162.....	244, 248
Sec. 5180 <i>et seq.</i>	117
Sec. 5181.....	357
Sec. 5182.....	117
Sec. 5184.....	357
Sec. 5186.....	356

(Civil Code.)

Sec. 1030 <i>et seq.</i> (Div. I., Part IV., Title XI.).....	531
Sec. 1078.....	68
Sec. 1641.....	308
Sec. 1642.....	308
Sec. 2245.....	90
Sec. 3860.....	440
Sec. 3861.....	55, 59
Sec. 3864.....	440
Sec. 4491.....	208, 210

(Code of Civil Procedure.)

Sec. 371.....	552
Sec. 377.....	327

Sec. 402.....	142, 144, 145
Sec. 417.....	143
Sec. 418.....	142, 143
Sec. 420.....	142, 226
Sec. 423.....	141
Sec. 428.....	142, 143
Sec. 460.....	40
Sec. 486.....	394
Sec. 494.....	393, 394, 395, 396, 399, 400
Sec. 514.....	7, 8
Sec. 559.....	7, 8
Sec. 570.....	39
Sec. 589.....	416
Sec. 613.....	331
Sec. 614.....	331
Sec. 615.....	331
Sec. 754.....	318
Sec. 770.....	26
Sec. 771.....	26
Sec. 772.....	26
Sec. 878.....	595
Sec. 1020.....	318
Sec. 1059.....	363
Sec. 1080.....	550
Sec. 1085.....	551
Sec. 1111 <i>et seq.</i>	380
Sec. 1114 <i>et seq.</i>	29, 379
Sec. 1115.....	29
Sec. 1155.....	336
Sec. 1157.....	41, 42, 126, 127, 335, 336
Sec. 1173.....	42
Sec. 1242.....	8, 36
Sec. 1822.....	416
Sec. 1722.....	306, 307, 308
Sec. 1723.....	28
Sec. 1739.....	322
Sec. 1743.....	332
Sec. 1822.....	321
Sec. 1961.....	135
Sec. 2010 <i>et seq.</i>	114
Sec. 2640 <i>et seq.</i>	309
Sec. 2921.....	307
Sec. 3101.....	536
Sec. 3108.....	508
Sec. 3109.....	544
Sec. 3146.....	364
Sec. 3321.....	59
Sec. 3341.....	260
Sec. 3379.....	536
Sec. 3380.....	426
Sec. 3390.....	77
Sec. 3471.....	260

(Penal Code.)

Sec. 30.....	557
Sec. 160 <i>et seq.</i>	145
Sec. 230.....	173, 175
Sec. 358.....	481, 509, 513, 519
Sec. 705.....	499, 500

Sec. 1734.....	506, 507, 524
Sec. 1818.....	506
Sec. 1910.....	506, 528
Sec. 1911.....	528
Sec. 2057.....	262
Sec. 2070.....	550, 551, 552, 553
Sec. 2078.....	526
Sec. 2081.....	163, 374, 546
Sec. 2089.....	509, 512, 513, 519
Sec. 2096.....	555
Sec. 2122.....	121
Sec. 2128.....	551, 552, 553
Sec. 2192.....	121, 528
Sec. 2281.....	96
Sec. 2442.....	468

LAWS OF 1897.

P. 48 (Broadwater County).....	138, 139, 175
P. 71 (County Surveyors).....	251
P. 134 (School Tax).....	236
P. 195 (Taxation).....	562
P. 245 (Cages in Mines).....	499, 500

LAWS OF 1899.

P. 65 (Road Supervisors).....	251
P. 146 (Appeals).....	306

STATUTORY CONSTRUCTION.

As to mandatory provisions of statute, see CRIMINAL LAW, 46.

Qualification of Aldermen—Amendment—Repeal.

1. In view of Political Code, Section 5180, adopted February 25, 1895, providing that laws passed at the session of the legislative assembly at which the Code was passed must be construed as if both had been passed on the last day thereof, and Section 2, providing that the Code shall not take effect until July 1, 1895, Compiled Statutes 1897, Div. 5, Section 365, relating to the qualification of aldermen, could not have been repealed or abrogated by the Code before July 1, 1895, and hence the act of March 7, 1895, (Political Code, Section 4753), amending it, was a valid amendment of an existing law, and became, under the act of March 13, 1895, (Political Code, Section 5180 *et seq.*), effective as a part of the Code on and after July 1, 1895.—*Dowdy v. Pittwood*, 113.

Qualifications of Alderman—Residence in Ward.

2. Political Code, Section 4753, providing that no person shall be eligible to the office of alderman unless a resident of the ward where elected "for at least one year preceding such election," means one year next preceding the election.—*Id.*

Courts Will Sustain Acts of the Legislature if Possible.

3. Courts will sustain the acts of the legislature in every case in which it is possible to do so under the recognized rules of interpretation. It is only where, after an act of the legislature has been subjected to the test of all the standards of interpretation, the intention cannot be discerned, or the means of carrying it out are not provided or are inadequate, or it is so conflictin and inconsistent in its provisions that it cannot be executed, that it will be declared inoperative and void.—*Huburn v. St. Paul, M. & M. Ry. Co.*, 229.

School Taxes—Inoperative and Void Law.

4. Political Code, Section 1940, as amended by Act of March 8, 1897, and numbered as Section 1940 b., providing for the submission to the voters of the district of the question whether school taxes, not to exceed 10 mills on the dollar, should be levied,

which requires a notice stating the amount to be raised, but which does not provide for a determination of such amount, before the submission of the question, and which provides, in mandatory terms, for a form by ballot in which the rate, but not the amount, is to be inserted, is inoperative and void, since it contains conflicting provisions, with no means of carrying either into execution.—*Id.*

School Taxes—Inoperative and Void Law.

5. Under Political Code, Section 5162, providing that, if the provisions of any title therein conflict with the provisions of any other title, the provisions of each title must prevail as to all matters and questions arising out of the subject-matter of such title, Section 1940, as amended by Act of March 8, 1897, and numbered as Section 1940 b., contained in Title III., relating exclusively to "Education," which provides for the levy of school taxes on a different basis of taxation than that provided for other taxes in Sections 3670-4063, in Title X., relating to "Revenue," but which contains no provision for the collection of the tax, or by which the roll on which such tax is computed can get upon the regular assessment roll of the county, provided for in Title X., is inoperative and void.—*Id.*

Correction of Statute by Court—Intent of Legislature.

6. The rule, in construing statutes, that, where it is manifested on the face of the act that an error has been made in the use of the words, the court may correct it, and read the statute as corrected, to give it the obvious intent of the legislature, does not justify the court in reading such a change into a statute as that the effect will be to abrogate a specific provision made therein.—*Id.*

Interpretation—Inveterate Practice.

7. The rules of construction: "That the contemporaneous and long-continued practice of officers required to execute or take special cognizance of a statute is strong evidence of its true meaning," and that, "if the legislature, by its inaction, has long sanctioned a certain construction, language apparently unambiguous may be given by the court such construction, especially if the usage has been public and authoritative," are only applicable in a condition of things where vested rights have been acquired, and where for many years the construction insisted upon has been the rule of action; and to disturb it would be to work great public and private injury and inconvenience. They are inapplicable in a case where the practice has not become inveterate, and the terms of the statute are both ambiguous and conflicting with each other and with other provisions of law which they cannot be held to amend or repeal.—*Id.*

Penal Statutes—Construction.

8. A statute requiring foreign corporations, before doing any business of any kind within the state, to file certain papers in certain public offices, and prescribing penalties against the corporation which attempts, or commences, to do business in the state without first having filed the necessary papers, is, in a sense appertaining to construction, a "penal" statute, and is to be construed strictly—not liberally.—*Manhattan Trust Co. v. Davis*, 273.

Statutes—Construction—Interpolation of Words.

9. Under the rules of construction laid down in Section 539, Division I, and Sections 207, 208, Division V, Compiled Statutes 1887, words, which are repugnant to the context, and to the real object of a statute, will not be interpolated.—*Id.*

Deputy County Attorneys—Annual Compensation.

10. Political Code, Section 4566, declares that the "maximum annual compensation allowed to any deputy" is as follows,—setting out various officers whose salaries are declared "not to exceed" the sum fixed, but in providing for the salary of chief deputy county attorney the words "not to exceed" were omitted. Held, that, since the statute by a general controlling limitation provided that all the amounts fixed should be "the maximum annual compensation allowed," the words "not to exceed" were surplusage, and hence the compensation of chief deputy county attorney was

not fixed by the statute at a certain sum, but might be established at a sum less than the maximum named, provided the power to determine the number of deputies and their compensation, within the maximum limits prescribed, may be exercised by some authority elsewhere recognized by law.—*Penwell v. Board of County Commissioners*, 331.

Deputy County Attorneys—Power of County Commissioners to Fix Salary.

11. Since deputy county attorneys are included by act of March 19, 1895, in Political Code, Section 4596, fixing the maximum salary of deputy county officers, the board of county commissioners have power to fix the salaries of deputy county attorneys under Session Laws 1893, p. 60, establishing the number of deputy county officers, and providing that their compensation shall be determined by the board of county commissioners, within the maximum limits fixed by the act, though deputy county attorneys are not provided for therein.—*Id.*

Statutes—Repeals by Implication.

12. Repeals by implication are not favored.—*Id.*

SURETIES.

Right to Enforce Contribution—Statute of Limitations.

1. The right of a surety, who has paid a judgment against his principal, and himself and other sureties, to enforce contribution from a co-surety, under the Code of Civil Procedure, Section 1242, which provides that a surety paying a judgment against his principal and himself and other sureties shall be entitled to the benefit of the judgment, to enforce contribution or repayment, if within 10 days after payment he shall file with the clerk of the court where the judgment was rendered notice of his payment, and claim for contribution, is not barred by the lapse of three years after the payment of a judgment, but exists so long as the judgment is alive; such a proceeding not being an ordinary action within the meaning of Section 559 of the Code of Civil Procedure.—*Northwestern Nat'l Bank v. Great Falls Opera House Co.*, 1.

Action to Enforce Contribution—Reimbursement.

2. In a proceeding by sureties to enforce contribution from a co-surety on a judgment paid by them, it appeared that the money with which the judgment was paid was borrowed on the individual note of the sureties seeking to enforce contribution; that at the maturity of said note it was paid with money borrowed on the note of the principal judgment debtor, a corporation which was indorsed by the sureties, who were members of its board of trustees; that the corporation was insolvent, and had been from the time of the payment of the judgment; that its liabilities greatly exceeded its assets; that at the time of the indorsement of the note it was well known by the indorsers, as well as the nonpaying co-surety, who was also a member of its board of trustees, that it would have to be paid by the indorsers; that it is still unpaid; and that the execution of said note was never authorized by the board of trustees, of which fact the co-surety had notice. *Held*, that the sureties had not been reimbursed by the principal debtor for the amount paid by them in satisfaction of the judgment.—*Id.*

Action to Enforce Contribution—Evidence.

3. In an action to enforce contribution, under the Code of Civil Procedure, Section 1242, which provides that a surety paying a judgment upon which he is jointly liable with others as surety shall be entitled to the benefit of the judgment to enforce contribution or repayment, if within 10 days after payment he shall file with the clerk a notice of payment, and claim of contribution, evidence that the execution of the notes on which the judgment paid was entered was authorized by the corporation defendant is immaterial.—*Id.*

Action to Enforce Contribution—Judgment—Remedy.

4. A surety who has paid a judgment against his principal and himself and others as sureties may take an assignment of the judgment to himself, and enforce contri-

bution from his co-sureties; the remedy afforded by Code of Civil Procedure, Section 1242, which provides that a surety paying such a judgment may have the benefit of it to enforce repayment and contribution, if within ten days after payment he files with the clerk a notice of payment and claim of repayment and contribution, not being exclusive.—*Merchants' Nat'l Bank v. Great Falls Opera House Co.*, 32.

Action to Enforce Contribution—Satisfaction of Judgment—Release.

5. A judgment against a principal and sureties was paid by one of the sureties, who took an assignment of it to compel contribution from his co-sureties. Thereafter the judgment was, at the request of the paying surety, satisfied of record to relieve the real estate of the paying surety from the lien. It was intended to have it satisfied only as to the paying surety. *Held*, that as to a co-surety who paid no consideration for it, such satisfaction did not release his liability to contribute.—*Id.*

Action to Enforce Contribution—Satisfaction of Judgment—Evidence.

6. In a proceeding to enforce contribution from a co-surety, by a surety who has paid and taken an assignment of a judgment against them, it is competent for the paying surety to testify that he did not intend to have the judgment satisfied as to his co-surety, where he had, after payment and assignment of the judgment, procured a formal satisfaction of it to release his real estate from the apparent lien thereof.—*Id.*

TAXATION.

School Taxes—Inoperative and Void Law.

1. Political Code, Section 1940, as amended by Act of March 8, 1897, and numbered as Section 1940 b., providing for the submission to the voters of the district of the question whether school taxes, not to exceed 10 mills on the dollar, should be levied, which requires a notice stating the amount to be raised, but which does not provide for a determination of such amount, before the submission of the question, and which provides, in mandatory terms, for a form by ballot in which the rate, but not the amount, is to be inserted, is inoperative and void, since it contains conflicting provisions, with no means of carrying either into execution.—*Hiburn v. St. Paul, M. & M. Ry. Co.*, 229.

School Taxes—Inoperative and Void Law.

2. Under Political Code, Section 5162, providing that, if the provisions of any title therein conflict with the provisions of any other title, the provisions of each title must prevail as to all matters and questions arising out of the subject-matter of such title. Section 1940, as amended by Act of March 8, 1897, and numbered as Section 1940 b., contained in Title III., relating exclusively to "Education," which provides for the levy of school taxes on a different basis of taxation than that provided for other taxes in Sections 3670-4063, in Title X., relating to "Revenue," but which contains no provision for the collection of the tax, or by which the roll on which such tax is computed can get upon the regular assessment roll of the county, provided for in Title X., is inoperative and void.—*Id.*

Special Taxes—Provisions of Law Must Be Complied With.

3. It is the rule in regard to special taxes, that the various steps provided by law to be taken in laying them must be observed; and the record of the proceedings must show that the provisions of the law have been complied with.—*Id.*

Assessment in Gross—Injunction to Restrain Sale.

4. Under Laws of 1839, page 219, Section 4, which makes it the duty of a taxpayer to furnish the assessor a list of all his property, and Section 5, requiring the assessor to value each lot separately, and Laws of 1837, page 62, Section 22, which provides that any person feeling aggrieved by any assessment may apply to the board of equalization for the correction thereof, equity will not enjoin the sale of separate lots assessed in gross, for the collection of the taxes thereon, where the complainant does not show that he attempted to have the irregularity corrected by application to the board, or some excuse for not doing so.—*Deloughrey v. Hinds*, 280.

Injunction to Restrain Collection of a Tax—Pleading.

5. In an action to restrain by injunction the collection of a tax alleged to have been irregularly and illegally assessed, a complaint which fails to show that plaintiff attempted to have the irregularity complained of corrected by application to the board of equalization, and does not allege any excuse for not doing so, is bad on demurrer.—*Id.*

Irregularity in Assessment—Equity—Relief.

6. A court of equity will not grant relief to a taxpayer when the only ground alleged to invoke its aid is an irregularity in the assessment.—*Id.*

Action to Enjoin Sale for Taxes—Pleading.

7. Under Laws of 1889, page 219, Section 4, which makes it the duty of a taxpayer to furnish the assessor a list of property owned by him, and Section 5, which makes it the duty of the assessor to assess each lot separately, where the complainant, in an action to enjoin the sale for taxes of one of several separate lots assessed in gross, alleges that complainant is the owner of the lot, but fails to show whether or not the complainant owned all of them at the time the assessment was made, and does not attack the assessment on any ground other than such assessment in gross, it will be presumed that he was either the owner of the several lots when the assessment was made, or that he purchased the lot since the assessment. In the former case he is not entitled to relief, as it is his duty to pay taxes on all the lots; and in the latter he cannot complain, as he took subject to the burdens.—*Deloughrey v. Hinds*, 260.

Action to Enjoin Sale for Taxes—Pleading.

8. In an action to restrain by injunction the collection of a tax alleged to have been irregularly assessed, a complaint which alleges that plaintiff "is" the owner of the lot in question, but fails to make tender of the amount of taxes admittedly just and due to the county and state, is bad on demurrer.—*Id.*

Assessment in Gross—Injunction to Restrain Sale.

9. An assessment is not void because made upon several parcels of land in gross, and equity will not enjoin the sale of separate lots, assessed in gross, for the collection of taxes thereon, where complainant does not show that he attempted to have the irregularity, of which he now complains, corrected by application to the board of equalization and offers no excuse for not doing so. (*Deloughrey v. Hinds*, 23 Mont. 260, affirmed.)—*Cobban v. Hinds*, 338.

Listing of Lands to Wrong Person—Injunction.

10. Under Political Code, Sections 4023-4026, which prohibit courts and judges from restraining the sale of property for nonpayment of any tax, except where the tax is illegal or not authorized by law, or where the property is exempt from taxation, the listing of lands to the wrong person is no ground for restraining the tax sale; since under Political Code, Sections 3700, 3916, 4014, it is but an irregularity or informality, which, of itself, does not avoid the assessment nor render the tax "illegal or unauthorized."—*Id.*

Listing of Land to One Other than the Owner.

11. An owner of land is, in law, bound to know: that his property is liable to taxation, and would be assessed annually; that a listing to one other than the owner would not avoid an assessment otherwise regular; when the taxes would fall due and should be paid, hence he cannot successfully urge, as a reason why his lands should be relieved of the lien for taxes, that he did not know of the assessment, and had no opportunity to discharge the taxes.—*Id.*

Tax Sale—Notice—Injunction.

12. The fact that the notice under which a tax sale was threatened was published but three weeks, whereas the statute required four weeks, does not render the taxes "illegal or unauthorized by law," within Political Code, Sections 4023-4026, so as to authorize the enjoining of the collection of such tax.—*Id.*

Tax Sale—Lands Purchased by County—Injunction.

13. The fact that a county treasurer intends to violate Political Code, Sections 3922, 3923, by exposing for sale for the delinquent taxes for 1898 part of the lands purchased by the county at the tax sales of 1897, and yet unredeemed, does not entitle the owner of the equity of redemption to an injunction; since Section 4026 provides that the remedy before the board of equalization shall supersede the remedy of injunction and all other remedies which might be invoked to prevent a collection of taxes alleged to be irregularly levied or demanded, except in unusual cases, where the remedy thereby provided is deemed by the court to be inadequate.—*Id.*

Assessment—Actual Value—Appeal.

14. Since there is no statute allowing an appeal from the action of the county assessor and board of county commissioners, sitting as a board of equalization, in preparing the assessment roll, under Political Code, Sections 3730 *et seq.*, 3780-3785, providing for valuing property for the purpose of taxation in counties where the assessed valuation is less than \$8,000,000, courts will not interfere with the action of these officers, where it does not appear that the assessor did not act fairly and honestly, or that the board of equalization did not give plaintiff a fair hearing, and where the only ground on which relief is sought is that the valuation of plaintiff's property was fixed at \$14,250, whereas its actual value was admittedly only \$9,700.—*Danforth v. Livingston*, 558.

Assessment—Over-Valuation—Presumption.

15. The fact that the assessor fixed the valuation of property at \$14,250, whereas its actual value was only \$9,700, is not, standing alone, such an excess in the valuation as to justify a conclusive presumption of fraud or malice on the part of the assessor.—*Id.*

TENDER.

As to tender of shares of corporate stock, see **CONTRACTS**, 15.
WAIVER, 5.

TRIAL.**Murder—Taking Exhibits to Jury Room.**

1. Where, on a prosecution for murder, the counsel for the defendant, in defendant's presence, consents to the taking to the jury room of certain exhibits admitted in evidence, such consent is a waiver of any objection to the sending of said exhibits to the jury while in retirement.

Quere: Whether, under the provisions of Section 2122 and Subdivision 2 of Section 2192 of the Penal Code, it is error to send to the jury while in retirement such exhibits, admitted in evidence, as the skull of the decedent, his bloody hat, and a certain blood-stained sack found at the place of the killing; or whether, without the defendant's consent, but in the exercise of a wise and sound discretion, the court may send to the jury in retirement exhibits other than papers.—*State v. Allen*, 118.

Opening Statement of Prosecuting Attorney.

2. It is not "misconduct" on the part of the prosecuting attorney to state to the jury in his opening statement that the defendant had made a confession, even though said confession be subsequently held to be inadmissible.—*State v. Sheppard*, 323.

Jury—Challenges—Waiver.

3. Where the state waived its fourth peremptory challenge, whereupon defendant exhausted his peremptory challenges, it was not error, on the panel's being filled and passed for cause, to permit the state to peremptorily challenge a juror who was in the box when the state waived its fourth challenge; since the state's waiver of its fourth challenge was not a waiver of any subsequent challenge it was entitled to.—*State v. Peel*, 358.

Nonexpert Witness—Insanity—Cross-Examination.

4. On a trial for homicide a nonexpert witness, giving his opinion as to the sanity of defendant, may be asked on cross-examination what he means by "insanity" and "unsoundness of mind," where there is no attempt to confuse him with technical distinctions.—*Id.*

Expert Witness—Insanity—Hypothetical Question.

5. Where defendant had unfriendly feeling towards deceased, and, failing in an attempt to procure decedent's prosecution, went into the street and killed him, and insanity was pleaded as a defense, it was proper for the state to ask an expert his opinion of one's consciousness and knowledge of right and wrong and unlawfulness of his act, "if he had a grudge against another, and had rationally conversed with officers about it, and should go from them, and lie in wait for his enemy until he came within the vicinity, and should shoot him, saying, 'Take that,' and, having shot him, should turn and say that he would go to the jail and give himself up, and within twenty minutes after the shooting should talk in a reasonable manner, apparently as conscious as he had ever been," since the state, in putting the hypothetical question, had a right to assume that the evidence tending to support its theory was true.—*Id.*

Expert Witness—Insanity—Hypothetical Question.

6. A question on the subject of Insanity, put to an expert in a criminal trial, need not embrace all the elements of the law of insanity, but may limit the inquiry to the degree of intelligence possessed by defendant under the circumstances of the act.—*Id.*

Defective Complaint—Objection to Receiving Evidence.

7. A motion, made at the trial, to exclude evidence, or an objection to receiving it, is not the remedy for the intermingling in one count of several causes of action.—*Bandmann v. Davis*, 382.

Criminal Law—Examination of Witness.

8. Permitting the prosecution to ask a witness as to a conversation between himself and deceased, over defendant's objection that he was not present, was not error, where the witness later testified to defendant's presence.—*State v. Peps*, 473.

Impeachment of Witness—Cross-Examination.

9. It was not error to allow the state to ask defendant's witness a question on cross-examination for the purpose of laying a foundation for his impeachment which was not germane to his direct testimony, since the state could have recalled the witness at any time for such purpose.—*State v. Hurst*, 484.

Presumption in Favor of Trial Court—Burden of Establishing Error.

10. Every reasonable intendment is in favor of the action of the trial court; the burden of establishing error is upon him who assails the ruling.—*State v. Calder*, 504.

Criminal Law—Examination of Witnesses.

11. It is error to deny the county attorney the right to examine witnesses because their names do not appear on the information, in the absence of a showing on the part of the defendant that the county attorney did in fact know of their existence at the time the information was filed.—*State v. Schnepel*, 523.

VENUE.

Change of Venue on the Ground of Residence—Mandamus.

Refusal in the district court of a change of venue on the ground of residence is a judicial act, which by Code of Civil Procedure, Section 1742, may be reviewed on an appeal from the final judgment; and hence *mandamus* will not lie to compel a judge to grant a change on such ground, the remedy by appeal from the final judgment being plain, speedy, and adequate.—*State ex rel. Independent Pub. Co. v. Smith*, 329.

VERDICT.

Appeal—Review—Evidence to Support Verdict.

1. A verdict of conviction of murder will not be disturbed where there is evidence to support it. It is not the province of the appellate court to usurp the office of the jury or the function of the trial court.—*State v. Allen*, 118.

Appeal—Review—Misconduct of Juror.

2. Where jurors in a capital case agreed upon a verdict of guilty on the third ballot, to which all agreed, when polled, it will not be set aside because one of them stated in the jury room, before the informal ballot was taken, that he was "willing a majority should rule."—*State v. Brooks*, 146.

WAIVER.

Homicide—Trial—Sending of Exhibits to Jury Room.

1. Where, on a prosecution for murder, the counsel for the defendant, in defendant's presence, consents to the taking to the jury room of certain exhibits admitted in evidence, such consent is a waiver of any objection to the sending of said exhibits to the jury while in retirement.—*State v. Allen*, 118.

Building Contract—Moving Into Building Not Completed According to Contract.

2. That the owner of a newly-constructed building refusing to accept the same because not completed according to contract moves into the building will not operate as a waiver of defects and acceptance.—*Franklin v. Schultz*, 165.

Building Contract—Intention.

3. An intention to waive defects in the construction of a building, and accept same as a compliance with the contract by payment of a portion of the final installment on the contract, will not be inferred, where it is not shown that payment was made with knowledge of the defects.—*Id.*

Contract—Assignment *Pendente Lite*.

4. Where, in an action on a contract, it appeared that plaintiff's interest had been assigned to another *pendente lite*, and defendant made no objection to such assignment in that action, he cannot subsequently object thereto in a proceeding to restrain the enforcement of the judgment recovered.—*O'Rourke v. Schultz*, 286.

Objection to Tender of Shares of Corporate Stock.

5. Where defendant objected to a tender of corporate shares on the ground that they had been attached in the hands of a former owner only, he cannot subsequently object to such tender on the ground of irregularities in the issuance of the certificates.—*Id.*

Jury—Challenges.

6. Where the state waived its fourth peremptory challenge, whereupon defendant exhausted his peremptory challenges, it was not error, on the panel's being filed and passed for cause, to permit the state to peremptorily challenge a juror who was in the box when the state waived its fourth challenge; since the states waiver of its fourth challenge was not a waiver of any subsequent challenge it was entitled to.—*State v. Peel*, 368.

WATER RIGHTS.

Appurtenance—Sale Under Mortgage.

1. The appropriation of a water right from a creek on the public domain for the purpose of irrigating a certain parcel of land, by a person who has no title to said land, but is in rightful possession of said land under a contract with the owner thereof, and the conducting by him of the water so appropriated by means of a ditch to said land, and its continuous use thereon, constitutes such water right and ditch—

in the absence of a segregation, change of possession, or diversion of the water by the owner thereof to a use other than that for which it was appropriated, or an intention to do so, and there being no agreement between the owner of the water right and the owner of the land upon which the water right was used by which it might be severed from said land — an incident to the ownership of the land on which it is used, and an appurtenance thereto which none but the owner of said land can convey or sell, and a purchaser at a foreclosure sale of a mortgage of the land, "together with all the water ditches and water rights therewith usually had and enjoyed," made by the owner of the water right, does not acquire any right or title to said water right.—*Smith v. Denniff*, 65.

Abandonment—Defective Finding.

2. A defective finding of an abandonment of a water right, in an injunction suit, is not on appeal ground for reversal of the judgment when the losing party has failed to follow Section 1114 *et seq.* of the Code of Civil Procedure.—*Haggin v. Sattle*, 375.

Riparian Rights.

3. A person has no rights as a riparian holder as against one who actually diverts and appropriates water for beneficial uses under statutes recognizing the right of appropriation.—*Id.*

Abandonment—Question of Fact.

4. The abandonment of a water right is a question of fact to be determined from the acts and intention of the party who is alleged to have abandoned the right; mere nonuser of a water right by itself does not constitute an abandonment; but a voluntary nonuser of water by a purchaser of a water right, without any intention to resume use thereof, and without the assertion of possession or title for a number of years after purchase, and where such purchaser has permitted the water to be taken, appropriated and used by others adversely for years, warrants an inference of abandonment.—*Id.*

WITNESS.

Instruction—Credibility.

1. An instruction which authorizes a jury to disregard the entire uncorroborated testimony of a witness, in cases where it is "probable" that he has deliberately and intentionally testified falsely as to some material matter, is bad, as authorizing the jury to judge of the effect of evidence arbitrarily.—*Cameron v. Wentworth*, 70.

Instruction—Credibility.

2. Nor would the instruction be improved by the use of the word "palpable," as the power of the jury would thereby be circumscribed by limiting their right to discard the testimony of a witness to those instances only where it is palpable the witness has testified falsely, and is not corroborated by other evidence.—*Id.*

Credibility.

3. Code of Civil Procedure, Section 3390, Subdivision 3, which provides "that a witness false in one part of his testimony is to be distrusted in others," requires the jury to distrust only a witness who willfully swears falsely as to material matters.—*Id.*

Deposition of a Witness Out of the State.

4. Under Code of Civil Procedure, Section 3341, which provides that the testimony of a witness out of the state may be taken in a special proceeding at any time after a question of fact has arisen, a deposition may be taken in disbarment proceedings.—*In re Wellome*, 259.

Insanity—Nonexpert Witnesses—Opinion.

5. The opinion of nonexpert witnesses, touching the mental condition of the person on trial, or the validity of whose act is in controversy, must be founded upon their own observation; they cannot be permitted to give an opinion founded upon facts

learned from other sources than their own observation, hence, a nonexpert witness, who was not present at a homicide, cannot express his opinion as to the sanity of the accused, based both on his previous knowledge of accused and hearsay knowledge of facts attending the homicide.—*State v. Peel*, 358.

Insanity—Nonexpert Witnesses—Opinion.

6. A nonexpert witness should always speak as of the time of his own observation; he should not be permitted to express an opinion as to the temporary or permanent nature of mental disease.—*Id.*

Insanity—Nonexpert Witness—Cross-Examination.

7. On a trial for homicide, a nonexpert witness, giving his opinion as to the sanity of defendant, may be asked on cross-examination what he means by "insanity" and "unsoundness of mind," where there is no attempt to confuse him with technical distinctions.—*Id.*

Insanity—Expert Witness—Hypothetical Question.

8. Where defendant had unfriendly feeling towards deceased, and, falling in an attempt to procure decedent's prosecution, went into the street, and killed him, and insanity was pleaded as a defense, it was proper for the state to ask an expert his opinion of one's consciousness and knowledge of right and wrong and unlawfulness of his act, "if he had a grudge against another, and had rationally conversed with officers about it, and should go from them, and lie in wait for his enemy until he came within the vicinity, and should shoot him, saying, 'Take that,' and, having shot him, should turn and say that he would go to the jail, and give himself up, and within twenty minutes after the shooting should talk in a reasonable manner, apparently as conscious as he had ever been," since the state, in putting the hypothetical question, had a right to assume that the evidence tending to support its theory was true.—*Id.*

Insanity—Expert Witness—Hypothetical Question.

9. A question on the subject of insanity, put to an expert in a criminal trial, need not embrace all the elements of the law of insanity, but may limit the inquiry to the degree of intelligence possessed by defendant under the circumstances of the act.—*Id.*

Disbarment Proceedings—Impeachment.

10. The testimony of two witnesses to acts by the accused constituting bribery is not impeached by that of six witnesses from the localities where the two live, to the effect that they bear a bad reputation for truth, when the six are the political opponents of the two, and some of them had had personal differences with the two, and others testified that they had a good opinion of the two until they testified to the bribery.—*In re Wellcome*, 450.

Disbarment Proceedings—Credibility—Detective.

11. That the principal witness in disbarment proceedings against the accused was a brother lawyer, and secured his evidence in a reprehensible manner, by acting as detective, and apparently entering into a criminal plan with the accused, in order to expose him, does not, of itself, render his evidence unworthy of belief.—*Id.*

Credibility.

12. A witness' credibility and the effect to be given his evidence are for the jury to determine.—*State v. Hurst*, 484.

Credibility.

13. The appellate court cannot try a case *de novo*, and thus invade the province of the trial court by passing upon disputed questions of fact and the credibility of witnesses.—*Id.*

Impeachment.

14. Where a witness based her testimony that threats against deceased were made by defendant on her recognition of his voice, it was not error to exclude evidence tending to show that such witness had mistaken the voice of another person on a different occasion, where it was not shown that the conditions were the same.—*Id.*

Impeachment.

15. It was not error to allow the state to ask defendant's witness a question on cross-examination, for the purpose of laying a foundation for his impeachment, which was not germane to his direct testimony, since the state could have recalled the witness at any time for such purpose.—*Id.*

Impeachment.

16. Under Code of Civil Procedure, Sec. 3380, declaring that a witness may be impeached by evidence that at other times he made statements inconsistent with his present testimony, a witness having denied making statements at a coroner's inquest, the state was properly allowed to call another witness in rebuttal, who was present when such statement was claimed to have been made, and ask him whether the former witness made a certain statement just after he finished his testimony before the coroner.—*Id.*

Defendant in Criminal Case—Impeachment.

17. When a defendant is sworn, and testifies in his own behalf, he is subject to the same rules of cross-examination and impeachment as any other witness, and it is competent for the state to impeach his testimony by evidence that his general reputation for truth, honesty and integrity is bad.—*State v. Sehnepel*, 529.

Redirect Examination.

18. Where the prosecuting witness testified on cross-examination that he had been in jail, he may, on redirect examination, explain the circumstances of his imprisonment.—*State v. McClellan et al.*, 582.

Prosecuting Witness—Impeachment.

19. Where a witness for the state testified that the prosecuting witness had paid out money for drinks in a saloon before the alleged robbery was committed, it was competent on cross-examination to show that the prosecuting witness had spent all his money before the robbery.—*Id.*

WORDS AND PHRASES.

"Action"—

In re Wellcome, 259.

"Affidavit"—

Reynolds v. Fitzpatrick, 59.

"Amount"—

Hilburn v. St. Paul, M. & M. Ry. Co., 240

"And" read "Or" —

Cotter v. Grand Lodge, A. O. U. W., 92.

"Approval," "Approve"—

State ex rel. State Pub. Co. v. Smith, 51.

"Breccia"—

Butte & Boston Min. Co. v. Societe A. d. M. d. L., 195.

"Conglomerate"—

Butte & Boston Min. Co. v. Societe A. d. M. d. L., 195.

"Continuity"—

Butte & Boston Min. Co. v. Societe A. d. M. d. L., 194.

"Considerable"—

Butte & Boston Min. Co. v. Societe A. d. M. d. L., 200.

"Convey," "Conveyance"—

Tuohy's Estate, 308, 309.

- "Corpus Delicti"—
State v. Pepo, 482.
State v. Calder, 513.
- "Fault Fissure"—
Butte & Boston Min. Co. v. Societe A. d. M. d. L., 195.
- "Final Judgment"—
Tuohy's Estate, 307.
- "Horse Matter"—
Butte & Boston Min. Co. v. Societe A. d. M. d. L., 195.
- "Identity"—
Butte & Boston Min. Co. v. Societe A. d. M. d. L., 194.
- "Irresistible Impulse"—
State v. Peel, 371.
- "Insanity"—
State v. Peel, 369.
- "Mine"—
State v. Anaconda Copper Min. Co., 502.
- "Mining Claims"—
Horst v. Shea, 390.
- "Net Proceeds"—
Yank v. Bordeaux, 212.
- "Oral Instructions"—
State v. Fisher, 558.
- "Palpable"—
Cameron v. Wentworth, 76.
- "Penal"—
Manhattan Trust Co. v. Davis, 279.
- "Presumption of Innocence"—
State v. Harrison, 80.
- "Probable"—
Cameron v. Wentworth, 75.
- "Rate"—
Hilburn v. St. Paul M. & M. Ry. Co., 240.
- "Reasonable Doubt"—
State v. Harrison, 80.
- "Unreasonable Fit of Passion"—
State v. Brooks, 157.

TABLE OF MONTANA CASES CITED.

Comprising the former decisions of this Court, cited or commented upon in the opinions in this volume.

Anderson v. Carlson, 23 Mont. 43.....	66, 120
(Defective Brief.)	
Ayotte v. Thomas, 20 Mont. 223.....	43
(Statement on Motion for New Trial.) DISTINGUISHED.	
Babcock v. Caldwell, 22 Mont. 460.....	66, 120
(Defective Brief.)	
Bach, Cory & Co. v. Mont. L. & P. Co., 15 Mont. 345.....	78
(Claim and Delivery—Pleading.)	
Baker v. Power, 7 Mont. 326.....	60
(Chattel Mortgage.)	
Beatty v. Murray Placer Mining Co., 15 Mont. 314.....	68
(Water Right—Appurtenance.)	
Bonner v. Minnler et al., 13 Mont. 269.....	325
(Record on Appeal.)	
Buck v. Fitzgerald, 21 Mont. 482.....	293
(Appeal—Exceptions.)	
Carman v. Staudaker, 20 Mont. 364.....	68
(Appurtenance.)	
Casey v. Wright, 14 Mont. 315.....	270
(Taxation.)	
Chumasero v. Potts, 2 Mont. 242.....	49
(Mandamus.)	
Cobban v. Hinds, 23 Mont. 338.....	563
(Taxation.)	
Creek v. Bozeman Water Works Co., 22 Mont. 327.....	321, 337
(Undertaking on Appeal.)	
Creek v. McManus, 13 Mont. 152.....	317
(Equitable Relief—Injunction.)	
Daniels v. Andes Ins. Co., 2 Mont. 500.....	424
(Law of the Case.)	
Davenport v. Kleinschmidt, 8 Mont. 467.....	424
(Law of the Case.)	
Davis v. Clark, 2 Mont. 310.....	397, 398
(Statute of Limitations.)	
Deloughrey v. Hinds, 23 Mont. 280.....	348
(Taxation.)	
Dillon v. Bayliss, 11 Mont. 171.....	103
(Mining Claims.)	
(Mining Claims.) DISTINGUISHED.....	106, 107

Eddy v. Kenney, 5 Mont. 502.....	64
(Chattel Mortgage—Conversion—Demand.)	
First Nat'l Bank v. Bailey, 15 Mont. 301.....	271
(Taxation—Injunction.)	
First Nat'l Bank v. Roberts, 9 Mont. 323.....	26
(New Trial—Specifications.)	
Fitzgerald v. Clark, 17 Mont. 100.....	193
(Mining Claims.)	
Flavin v. Mattingly, 8 Mont. 242.....	102
(Mining Claims.)	
(Mining Claims.) DISTINGUISHED....	389
Forrester et al. v. Boston & Mont. Con. C. & S. M. Co., 21 Mont. 544.	126
(Former Appeal.)	
Forrester et al. v. Boston & Mont. Con. C. & S. M. Co., 21 Mont. 565..	126
(Former Appeal.)	
Forrester et al. v. Boston & Mont. Con. C. & S. M. Co., 22 Mont. 430.	
(Former Appeal).....	126, 127
Gallagher v. Cornelius et al., 23 Mont. 27.....	380
(Implied Findings.)	
Gamer v. Glenn, 8 Mont. 371.....	102
(Mining Claims.)	
Gans v. Switzer, 9 Mont. 408.....	280
(Penal Statutes.)	
Garfield Mining & Milling Co. v. Hammer, 6 Mont. 53.....	102, 389, 414
(Mining Claims.)	
Gibson v. Hubbard, 22 Mont. 517.....	44, 120
(Defective Brief.)	
Giddings v. Holter, 19 Mont. 263.....	280
(Penal Statutes.)	
Haggin v. Salle et al., 14 Mont. 79.....	379
(Former Appeal.)	
Haggin v. Salle, 23 Mont. 375.....	438
(Findings.)	
Hamilton v. Great Falls St. Ry. Co., 17 Mont. 334.....	325
(Record on Appeal.)	
Hamilton v. Nelson, 22 Mont. 539.....	26
(New Trial.)	
Heilbronner v. Lloyd, 17 Mont. 299.....	442
(Chattel Mortgage.)	
Hoffman v. Beecher, 12 Mont. 489.....	102, 414, 415
(Mining Claims.)	
In re Bloor, 21 Mont. 49.....	143
(Disbarment Proceedings.)	
In re Higgins' Estate, 15 Mont. 475.....	307
(Appeal in Probate Proceedings.) DISTINGUISHED.	
In re McFarland's Estate, 10 Mont. 446.....	307, 308
(Appeal in Probate Proceedings.) DISTINGUISHED.	
In re Plume, 23 Mont. 41.....	336
(Bill of Exceptions.)	

In re Wellcome, 23 Mont. 140.....	259
(Disbarment Proceedings.)	
In re Wellcome, 23 Mont. 213.....	259, 468
(Disbarment Proceedings.)	
In re Wellcome, 23 Mont. 259.....	468
(Disbarment Proceedings.)	
Jobb v. Meagher County, 20 Mont. 424.....	117, 356
(Statutes—Interpretation.)	
(Statutes — Constitution.).....	501
King v. Thomas, 6 Mont. 410.....	397
(Statute of Limitations.)	
Kelley v. Cable Co., 8 Mont. 440.....	424
(Law of the Case.)	
Lawlor v. Kemper, 20 Mont. 13.....	382
(Equity — Jury — Instructions.)	
Leopold v. Silverman, 7 Mont. 266.....	442
(Chattel Mortgages.) DISAPPROVED.	
Maddox v. Teague, 18 Mont. 512.....	424
(Law of the Case.)	
Marcum v. Coleman, 10 Mont. 73.....	60
(Chattel Mortgages.)	
Marshall v. Livingston Bank, 11 Mont. 351.....	439
(Assignment for the Benefit of Creditors.)	
Mattingly v. Lewishon, 8 Mont. 259.....	415
(Adverse Claim—Pleading.)	
McAdow v. Black, 4 Mont. 495.....	211
(Debtor and Creditor.)	
McCauley v. Tyler, 11 Mont. 51.....	26
(New Trial.)	
McCowan v. Maclay, 16 Mont. 234.....	389
(Mining Claims.)	
McKay v. McDougal, 19 Mont. 488.....	415
(Mining Claims.)	
Menard v. Mont. Cent. Ry. Co., 22 Mont. 340.....	26
(New Trial.)	
(Record on Appeal—Opinion of Trial Court.).....	204
Merchants' Nat'l Bank v. Great Falls O. H. Co., 23 Mont. 33.....	15
(Cited.)	
Metcalf v. Prescott, 10 Mont. 283.....	103
(Mining Claims.)	
Meyer v. Carothers, 14 Mont. 274.....	397
(Statute of Limitations.)	
Miles v. Edwards, 6 Mont. 180.....	317
(Injunction.)	
Milligan v. Savery, 6 Mont. 130.....	413
(Mining Claims—Adverse Claims—Action.)	
Montana Min. Co. v. St. Louis M. M. Co. et al., 19 Mont. 313.....	318
(Jurisdiction.)	
Morrison v. Bennett, 20 Mont. 560.....	31
(Illegal Contracts.)	

Moxon v. Wilkinson, 2 Mont. 421.....	396
(Mining Claims.)	
Murphy v. N. P. Ry. Co., 22 Mont. 577.....	321, 337
(Undertaking on Appeal.)	
Murray v. Heinze, 17 Mont. 353.....	26
(New Trial.)	
Murray v. Polglase, 17 Mont. 455.....	402
(Former Appeal.)	
(Mining Claims—Law of the Case.).....	424
Northwestern Nat'l Bank v. Great Falls O. H. Co., 23 Mont. 1.....	31, 35
(Illegal Contract.)	
Nor. Pac. R. R. Co. v. Lilly, 6 Mont. 65.....	420
(Land Grants.)	
Nor. Pac. R. R. Co. v. Majors, 5 Mont. 111.....	420
(Land Grants.)	
Nor. Pac. R. R. Co. v. Patterson, 10 Mont. 93.....	269, 270, 271
(Taxation—Injunction.)	
O'Donnell v. Glenn, 8 Mont. 248.....	102, 339
(Mining Claims.)	
Oppenheimer v. Bank, 20 Mont. 192.....	211
(Debtor and Creditor.)	
Oppman v. Steinbrenner, 17 Mont. 369.....	7
(Statute of Limitations.)	
Palmer v. Murray, 8 Mont. 174.....	424
(Law of the Case.)	
Patten v. Hyde, 23 Mont. 23.....	204
(New Trial.)	
Power v. Gurn, 6 Mont. 5.....	318
(Judgment on the Pleadings.)	
Priest v. Elde, 19 Mont. 53.....	425
(Law of the Case.)	
Proctor v. Cascade County, 20 Mont. 315.....	117
(Statutes—Interpretation.)	
Ray v. Cowan, 18 Mont. 259.....	26
(New Trial.)	
Reynolds v. Fitzgerald, 23 Mont. 52.....	211
(Debtor and Creditor.)	
Rocheleau v. Boyle, 11 Mont. 451.....	442
(Chattel Mortgages.)	
Russell v. Chumaseero, 4 Mont. 309.....	102, 339
(Mining Claims.)	
Sanders v. Noble, 22 Mont. 119.....	103, 339
(Mining Claims.)	
Schultz v. O'Rourke, 18 Mont. 418.....	290
(Former Appeal.)	
Sloan v. Glancy, 19 Mont. 70.....	68
(Appurtenance.)	

State v. Allen, 23 Mont. 118.....	328
(Defective Brief.)	
State v. Anderson, 14 Mont. 541.....	430
(Misconduct of Jury.)	
State (ex rel.) v. Benton, 13 Mont. 306.....	325
(Record on Appeal.)	
State v. Biggerstaff, 17 Mont. 510.....	497
(Argument of Counsel—Exception.)	
State v. Black, 15 Mont. 151.....	506, 507, 508
(Indorsing Name of Witness on Information.)	
State (ex rel.) v. Board of Canvassers, 13 Mont. 23.....	135
(Mandamus.)	
State (ex rel.) v. Board of County Commissioners, 21 Mont. 469.....	174
(Jurisdiction.)	
State v. Brooks, 23 Mont. 146.....	372
(Insanity.)	
(Burden of Proof.).....	374
State v. Cadotte, 17 Mont. 315.....	497
(Argument of Counsel—Exception.)	
State v. Calder, 23 Mont. 504.....	525
(Indorsing Names on Information.)	
(Homicide — Degrees — Instruction.).....	545
State (ex rel.) v. Cave, 20 Mont. 468.....	238, 244
(Statutes—Interpretation.)	
State (ex rel.) v. Coad, 23 Mont. 131.....	171, 173
(Mandamus.)	
(Jurisdiction.).....	174
State (ex rel.) v. District Court, 22 Mont. 220.....	126
(Cited.)	
State (ex rel.) v. District Court, 22 Mont. 241.....	126
(Cited.)	
State (ex rel.) v. District Court, 22 Mont. 376.....	126
(Cited.)	
State (ex rel.) v. District Court, 22 Mont. 438.....	126, 127, 129
(Cited.)	
State (ex rel.) v. Evans, 13 Mont. 239.....	332
(Change of Venue.)	
State v. Gay, 18 Mont. 51.....	480
(Misconduct of Jury.)	
(Instruction on Weight of Evidence.).....	481
State v. Geddes, 22 Mont. 68.....	520
(Corroboration of Accomplice.)	
State v. Gibbs, 10 Mont. 213.....	80
(Presumption of Innocence—Reasonable Doubt.)	
State v. Gleim, 17 Mont. 17.....	481
(Instruction on Weight of Evidence.)	
(Burden of Proof—Reasonable Doubt.).....	528
State (ex rel.) v. Hogan, 22 Mont. 384.....	47, 51
(Contract with State.)	
State v. Jackson, 9 Mont. 508.....	479, 480
(Misconduct of Jury.)	
State (ex rel.) v. Mayor of Great Falls et al., 19 Mont. 518.....	22
(Mandamus.)	
(Mandamus.) DOUBTED.....	23

State v. McCaffery, 16 Mont. 38.....	528
(Objection to Information — Waiver.)	
State v. Mitchell, 17 Mont. 67.....	501
(Constitutional Law.)	
State v. Montana Ore Purchasing Co., 22 Mont. 352.....	126
(Cited.)	
State v. Pepo, 23 Mont. 473.....	514
(Proof of Corpus Delicti.)	
State (ex rel.) v. Rickards, 16 Mont. 145.....	49, 51
(Mandamus.)	
State v. Rolla, 21 Mont. 582.....	373
(Inconsistent Instructions.)	
State (ex rel.) v. Rotwitt, 17 Mont. 41.....	117, 357
(Statutes—Interpretation.)	
State v. Sloan, 22 Mont. 293.....	156
(Manslaughter — Instruction.)	
(Record on Appeal.).....	325
(Jury—Challenges.)	362
(Witnesses.).....	525
State v. Spotted Hawk, 22 Mont. 33.....	525
(Alibi—Burden of Proof.)	
State v. Welch, 22 Mont. 99.....	555
(Advising Acquittal.)	
State (ex rel.) v. Wines and Booth, 21 Mont. 464.....	468
(Disbarment—Presumption of Innocence.)	
State Savings Bank v. Johnston et al., 18 Mont. 440.....	280
(Penal Statute.)	
Steel v. Gilpatrick, 18 Mont. 453.....	117
(Statutes—Interpretation.)	
Stewart v. Miller, 1 Mont. 301.....	317
(Injunction.)	
Strasburger v. Beecher, 20 Mont. 143.....	26
(New Trial—Specification.)	
Sweetland v. Olsen, 11 Mont. 27.....	68
(Appurtenance.)	
 Territory v. Burgess, 8 Mont. 57.....	 490
(Misconduct of Jury.)	
(Requested Instruction—Error.).....	537
Territory v. Clayton, 8 Mont. 1.....	490
(Misconduct of Jury.)	
Territory v. Edmonson, 4 Mont. 146.....	374
(Murder—Burden of Proof.) OVERRULED.	
Territory v. Hart, 7 Mont. 489.....	158
(Criminal Law—Instructions.)	
(Insanity—Non-expert Witness—Opinion.)	364
Territory v. McAndrews, 3 Mont. 158.....	80
(Presumption of Innocence—Reasonable Doubt.)	
(Murder — Instruction.).....	522
Territory (ex rel.) v. Potts, 3 Mont. 364.....	49
(Mandamus.)	
Territory v. Roberts, 9 Mont. 12.....	364
(Insanity — Non-experts — Opinions.)	

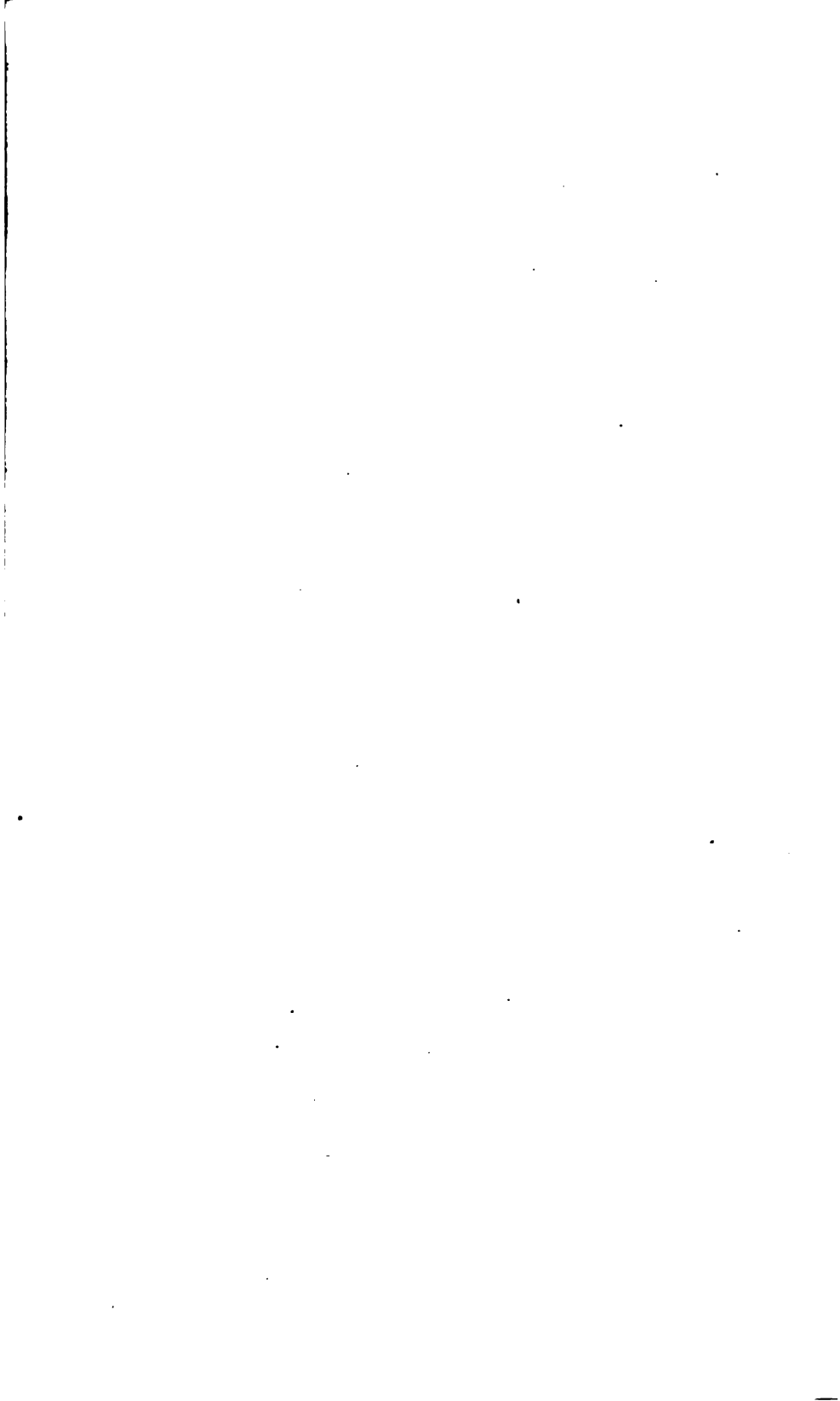
TABLE OF MONTANA CASES CITED.

683

Territory v. Tunnell, 4 Mont. 148.....	374
(Murder—Burden of Proof.) OVERRULED.	
Tucker v. Jones, 8 Mont. 225.....	68
(Appurtenance.)	
Tuttle v. Hardenberg, 15 Mont. 219.....	63
(Conversion.)	
Upton v. Larkin, 7 Mont. 449.....	102, 389
(Mining Claims.)	
United States v. Nor. Pac. R. R. Co., 6 Mont. 351.....	420
(Land Grants.)	
Ward v. County Commissioners, 12 Mont. 23.....	269, 270
(Taxation—Injunction.)	
Washoe Copper Co. v. Hickey, 23 Mont. 319.....	337
(Undertaking on Appeal.)	
(Injunction — Appeal.).....	565
Wastle v. Montana U. Ry. Co., 17 Mont. 213.....	526
(Instruction—Invading Province of Jury.)	
Weibbold v. Davis, 7 Mont. 107.....	397
(Statute of Limitations.)	
Wethey v. Kemper, 17 Mont. 491.....	280
(Penal Statute.)	
Wolverton v. Nichols, 5 Mont. 89.....	413, 414
(Mining Claims—Adverse Claim.)	
Wortman v. Mont. Cent. Ry. Co., 22 Mont. 266.....	90
(Contracts Ousting Jurisdiction of Courts.)	
Wulf v. Manuel, 9 Mont. 279.....	415
(Mining Claims—Adverse Claim.)	
Zion Co-operative Merc. Ass'n, 22 Mont. 100.....	532
(Foreign Corporations—Pleading.)	

Ch. C. S. A.

2194 049 m



LIBRARY